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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Petitioner (Libellant-Appellee)

AGAINST

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK
Respondent (Respondent-Appellant)

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New York and Cuba Mail Steamship Company, a Maine corporation, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit rendered January 27, 1941, reversing an interlocutory decree in admiralty of the District Court for the Southern District of New York entered June 19, 1940 (R. 1342). That decree granted recovery to petitioner under its libel brought against respondent, The Continental Insurance Company, based on its protection and indemnity insurance policy dated March 1, 1934 in the amount of $4,600,000 covering petitioner's steamship *Morro Castle* (R. 824).

Jurisdiction

Jurisdiction is based on Section 240 (a) of the Judicial Code as amended, (28 U. S. C. 347).

The order on mandate below was entered February 17, 1941 (R. 1399).

Opinions below

The opinion of the District Court (Goddard, D. J.) is reported at 32 F. Supp. 251.

The opinion of the Circuit Court of Appeals is reported at 117 F. (2d) 404.

A petition for rehearing (R. 1382-95) was denied without opinion February 15, 1941 (R. 1397).

Summary Statement

Petitioner's claim under the policy comprehended the liabilities and expenses incurred and paid by petitioner as a result of the loss of some 123 lives, many personal injuries and various property losses following the fire (origin undetermined) on the *Morro Castle* the early morning of September 8, 1934, while proceeding from Havana to New York, whereby she became a total loss.

The *Morro Castle* had been built with aid of a construction loan under the Merchant Marine Act, 1928. She was owned by Agwi Navigation Company and was mortgaged to the United States as security for repayment of that loan. She was chartered bare-boat for 20 years to the petitioner as operator (Exs. 79, 80, R. 898). Both these companies were subsidiaries of Atlantic Gulf and West Indies Steam-

ship Lines, in whose favor as well as theirs, and in favor of the United States as mortgagee, the respondent's policy ran.

Policy in Suit

Respondent's Protection and Indemnity policy of March 1, 1934 provided:

"The Assurers hereby undertake to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expenses as the Assured, without their *actual* fault or privity, shall have become liable to pay and shall pay as shipowners or as having an interest in the vessel named herein on account of the liabilities, risks, events, happenings and/or occurrences herein set forth:" (Italics ours.)

(Here in a succession of 14 numbered items followed specifications of liability assumed by respondent —for death, personal injury, property losses, expenses, etc.)

• • • • •

"General Conditions and/or Limitations

* * * that in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take such steps to protect his (and/or the assurers') interests as would reasonably be taken in the absence of this or similar insurance.

• • • • •

The Assurers shall not be liable to the Assured for any loss, damage, or expense to which the Assured, or the *managing officers* of his organization are privy, or which arises from his or their act or neglect." (Italics ours.)

Said policy covered the *Morro Castle* liability up to $4,600,000 from February 20, 1934, to February 20, 1935.

She had been thus insured with respondent since August 15, 1930, originally for $5,000,000, reduced to $4,600,000 from February 20, 1933.

Changes in privity clause

The word "actual" had first been inserted before "fault or privity" in the February 20, 1933, policy and the word "managing" had been inserted before "officers" by an indorsement dated July 7, 1931, on the 1930-31 policy.

"Actual" fault is in sharp contrast with imputed fault.

Petitioner's steamship *Oriente* had substantially the same construction and insurance history as the *Morro Castle.* Following the *Morro Castle* fire the *Oriente* policy for the year 1935-1936 was amended by inserting "or managing agent", so that the condition against liability then read:

> "The Assurers shall not be liable to the Assured for any loss, damage, or expense to which the Assured, or a managing officer *or managing agent* of its organization is privy, or which arises from its or their act, design or neglect." (Italics ours.)

In the 1936-1937 *Oriente* policy "actual" was eliminated before "privity".

Thus *at the time of the fire* the scope of "fault or privity" in the *Morro Castle* policy was limited by "actual", and the category of persons whose "act or neglect" might charge the corporation with privity was limited to "managing officers," and did not include a "managing agent". The policy was revised to include such agent in February 1935, *after* the fire.

The "managing officer" of petitioner, a large company operating many ships, was Henry E. Cabaud, Vice President. Among the several subordinates employed by petitioner for its several vessels and under the jurisdiction of Vice President Cabaud was Thomas Torresson, the marine superintendent. Cabaud had complete supervision, and went on board each time the vessel was in New York.

Operations under U. S. Steamboat Inspectors

The *Morro Castle* had been in charge of an experienced and competent master (Willmott), who died suddenly early in the evening of September 7, 1934, whereupon the command of the *Morro Castle* was taken over by her chief officer (Warms)—about 6½ hours before the fire was discovered. Up until this time Warms was acting solely under the instructions of Captain Willmott.

Captain Willmott had reported monthly to the U. S. Steamboat Inspectors at New York concerning exercise and drill of the crews, condition of the vessel and her equipment, and otherwise as required by the regulations of the Department of Commerce (Ex. 54, R. 877). Also, in accordance with the regulations, the U. S. Steamboat Inspectors at New York had periodically inspected the vessel, and had required the officers and crew to exercise and drill in their presence (R. 665-70; 694-7; 751-5; 767-9; 774-5). The entries in the ship's logs with reference to fire and boat drills and in other respects were periodically examined and found satifactory by the Inspectors (R. 676; 761). At no time was any criticism or complaint made by the Steamboat Inspectors, either to those connected with the ship or

petitioner's shore forces, that the discipline on the ship under the jurisdiction of her master was otherwise than it should have been to accord with the safety statutes and regulations.

We annex hereto in Appendix C excerpts from the evidence concerning inspections by the U. S. Steamboat Inspectors.

Although Captain Wilmott had been instructed that the crew be divided into equal watches, the division of the watches on the *Morro Castle,* made pursuant to his instructions, was shown at the trial not to be in accord with the equal watch statute, 46 U. S. C. 673 (Finding 11, R. 1335). It also developed on the trial that on the *Morro Castle* it had been so arranged that only three of the seven men signed on as watchmen were under the direct charge of the officer in command, in violation of the regulations; that during fire and boat drills at sea not all of the crew went to their stations, and that at the time of the fire two deck hydrants had no hose attached to them and three others were capped in violation of the regulation which requires hydrants be kept "ready for immediate service."

The manager and representatives of respondent's Safety Department visited the ship from time to time and had full facility of inspection (R. 798-815; 842-76).

District Court Proceedings

Petitioner brought a limited liability proceeding in October, 1934, in the District Court for the Southern District of New York. In the concourse of claimants there established, a complete settlement was made of all the claims and a final decree entered thereon (R. 826), under which

petitioner paid to claimants $890,000 in discharge of all its liabilities. The expenses of petitioner were $229,817.12. Respondent refused to pay under its insurance policy, after due proofs of loss. Libel was therefore filed by petitioner against respondent in the District Court for the Southern District of New York December 7, 1937.

The case was tried before Goddard, D. J., February 6-21, 1939. The District Court filed its opinion in favor of petitioner March 12, 1940 (R. 1301-29), and made detailed findings of fact and conclusions of law in accordance with Admiralty Rule 46½ June 19, 1940 (R. 1340-41). Interlocutory decree was thereupon entered, wherein a commissioner to fix the damages was appointed (R. 1342-3).

For the convenience of this Court the findings and conclusions are included in Appendix A hereto.

The District Court found that neither petitioner nor any of its managing officers was chargeable with privity to any of the acts of negligence that gave rise to the disaster, or to the violations of safety statutes and regulations on shipboard that had taken place. The Court found that those violations would have prevented petitioner, because of R. S. 4493, 46 U. S. C. 491, from limiting liability under R. S. 4283, 46 U. S. C. 183, without reference to any question of privity.*

That is to say, petitioner was held liable for passengers' *full* damages because of the violations of safety statutes and regulations at sea by the ship's personnel, which violations petitioner could not have proved did not somehow cause or contribute to the loss. *The Pennsylvania*, 19 Wall.

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* These statutes are quoted in Appendix B.

125. This was irrespective of any question of statutory privity under R. S. 4283, which question was not in issue in the District Court. This is clear from the fact that the recovery granted on the crew claims was on the basis of limited liability therefor.

In other words, it was because of the condition imposed on R. S. 4283 by R. S. 4493 that petitioner was liable in full to passenger claimants, rather than because of privity under R. S. 4283. Judge Goddard considered (R. 1324) that *Butler* v. *Boston,* 130 U. S. 527 had left open the question as to the effect of R. S. 4493, which later appeared to have been ruled differently as between *Hines* v. *Butler* (4th Circ.) 278 Fed. 877 (cert. denied 257 U. S. 659) and the *Princess Sophia* (9th Circ.) 61 F. (2d) 339, (cert. denied 288 U. S. 604).

Judge Goddard said (R. 1324):

"I think that it is fairly clear that the purpose of Section 4493 of the Revised Statutes passed in 1852 must have intended to provide that such damage as came within Section 4493 was not to be subject to diminution under the Limitation Statute enacted in the previous year. The object of Sec. 4493 undoubtedly was to provide additional safeguards on vessels carrying passengers and to compel as near as possible the observance of safety laws and regulations. It seems to me that it was the clear intention of Congress to provide that if an owner violates these rules and regulations, it may not avail itself of the full benefits of the Limitation Statute but becomes liable to passengers under Sec. 4493, and that this section was intended as a supplement to Sec. 4283. The effect of Sec. 4493 is to add a further condition upon which limitation may be granted".

Under its findings the District Court held libellant entitled to recover all its loss in connection with passenger

claims, also the crew claims on limitation basis, but denied recovery in connection with cargo claims (Conclusions 5, 6, 7, R. 1341). This was notwithstanding that the settlement of its liabilities which petitioner had made with claimants was a lump sum settlement, for an amount it was prepared to show was less than the total of its liabilities. Petitioner filed cross-assignments of error (R. 1355-7) against what it deemed prejudicial limitations in said conclusions, on the appeal taken by respondent (R. 1343-52) from the interlocutory decree.

The Circuit Court of Appeals did not pass on said cross-assignments, nor did it consider the interrelation of R. S. 4493 and R. S. 4283 (R. 1377), or the conflict in the several cases mentioned by the District Judge (R. 1324).

Respondent claimed that conviction established policy privity

The principal basis for respondent's charge and defense of privity was that the petitioner corporation and Cabaud, its Vice-President, had been indicted and convicted in the District Court under Section 282 of the United States Criminal Code (18 U. S. C. 461) which reads as follows:

"*Loss of Life by misconduct of officers of vessels; liability of corporation officer.* Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined not more than $10,000, or imprisoned not more than ten years, or both. When the owner or charterer of any

steamboat or vessel shall be a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct or violation of law, by which the life of any person is destroyed, shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

The elements of offense (manslaughter) by the owner are seen to be different from the elements of offense by an executive officer. In either category the destruction of a single life by the specified causes is enough to support charges under the statute.

Captain Warms and Chief Engineer Abbott of the *Morro Castle* were both indicted and tried at the same time with petitioner and Cabaud. Although convicted and sentenced to prison, their convictions were reversed in the Circuit Court of Appeals, 89 F. (2d) 166, substantially on the ground that the statutory violations which had taken place on the *Morro Castle* did not involve them, but only Captain Willmott. The appeals of petitioner and Cabaud were withdrawn before argument of the appeals of Warms and Abbott. Prison sentence adjudged against Cabaud had been suspended by District Judge Hulbert, although the fine against him as well as the petitioner was permitted to stand. This leniency to Cabaud by Judge Hulbert, in contrast to non-suspension of his prison sentences against Warms and Abbott, suggests a belief on his part that actual fault was attributable to action taken or not taken on ship-

board at sea in connection with the fire rather than to any acts or omissions of Cabaud, who was not on board.*

Petitioner contested admission of the conviction by the District Judge because it had no relevancy in the suit against respondent on the insurance policy, emphasizing that petitioner's claim was not based on an illegal act, and that the conviction was no evidence of privity under the policy, which did not mention statute violations as bearing on privity. The District Judge nevertheless admitted the same as *prima facie* evidence, apparently on the theory of the dictum in *Schindler* v. *Royal Insurance Co.*, 258 N. Y. 310, but held that any effect it had was overcome by the other evidence in the case (R. 1328).**

Circuit Court of Appeals Decision

Confusion of statute with policy

The Circuit Court of Appeals (opinion by Clark, C. J.) swept aside the express finding of fact (Finding 18, R. 1339-

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* Finding 8 of the District Court reads (R. 1333-4):

8. The cause of the fire has never been discovered. Neither libelant nor its Managing Officer Cabaud was responsible for it. The losses were not so much due to the small fire which was discovered at 2:10, but to the failure of the *Morro Castle's* officers and crew to make prompt and sufficient use of the facilities which the ship provided for extinguishing the fire and protecting the passengers and ship; to the delay of some forty-five minutes in reporting it to the bridge; and to the violations of the safety statutes and regulations by the officers in charge of her.

** The Circuit Court of Appeals declined to give effect to the conviction, although Clark, C. J. thought that it "should have been treated as direct proof of the company's fault" (R. 1379). A. N. Hand C.J. and Swan C.J. thought otherwise; the conflict of opinion on this point is mentioned below, p.

40) made by the District Court that neither petitioner nor its managing officers were in privity. It raised marine superintendent Torresson to the category of a managing *officer* notwithstanding that the record was clear that Cabaud was the only managing officer, and Torresson a subordinate *agent* only (R. 644-5). The Court arrived at its conclusion by applying the privity decisions under the limited liability statute to interpretation of the insurance policy as concerned fault or privity of petitioner, notwithstanding the difference of language and notwithstanding the Court's own statement that "the analogy between a statutory provision for limited liability and a contract by a paid insurer to relieve its promisee of loss should not be pressed too far" (R. 1369).

The Court appears to have turned to decisions under the limitation statute because "There seem to be no explicit decisions to guide us as to the meaning of the crucial words in the policy" (R. 1369).

The Circuit Court of Appeals completely misconstrued the District Court's decision on the facts when it said: "The [District] Court held substantially with the respondent on the supporting defenses, * * * " (R. 1368). In view of the District Court's express finding against privity mentioned by the Circuit Court of Appeals itself (R. 1369) this comment of the Court is inexplicable.

After referring to decisions where statutory limitation of liability had been denied because some participation of employee managers had placed shipowners in privity under the statute, the Court said (R. 1371): "we do not think the precedents can be rendered inapplicable here by considering these persons as mere agents, or believe the con-

tracting parties had in mind *some subtle gradation of managerial officers''* (Italics ours). As to this it is right to inquire now what purpose the several studied alterations in the policy could have had if not to make an agreed classification which would be controlling on questions under the policy, independent of other questions. There was no "subtle" or other gradation, but an explicit limitation to "managing officers," of which class Torresson was not one.

The footnote of the opinion (R. 1370) wholly misses the point: the "formula applicable to a situation such as Torresson's" made fault by him as a "managing agent" material on privity only *after* February 20, 1935*, but not *before* that. For it was not until after the fire that the formula applicable to Torresson ("or managing agent") was introduced into the policy. Being an agent only and not an officer, he was excluded from the 1934 policy as concerned privity.

The Court implies that the emphasis in the phrase "managing officer" is on act of management, regardless of by whom. The history of the phrase shows otherwise. Originally the phrase dealt with privity of "officers", later the limiting word "managing" was inserted before "officers." Thus in genesis the privity clause was concerned only with "officers," later with only those officers that performed managerial functions; then, after the fire, it was extended to include persons like Torresson, by the words "or managing agent."

The Court suggested that petitioner "for natural reasons" had "called as few witnesses as possible" (R. 1372).

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* The *Morro Castle* fire was September 8, 1934.

Aside from the error of this comment, it does not appear from anything stated by the Court how additional witnesses would have helped right determination of the issues. The District Judge had not suggested any shortage of material witnesses, and as the end of the trial approached it was evident that the Court considered the evidence complete. Both Cabaud and Torresson testified before him, they being the persons on whom the privity issues revolved. Such of the earlier testimony of chief officer Warms, acting master at the time of the fire, as was desired by the respondent was stipulated into the record (R. 489).

The Court also said (R. 1375): "The president of libellant, a Mr. Mooney, saw one drill, but was not called." This statement is clear error. It appears only that Mr. Mooney was on board the *Morro Castle* as a passenger on an Easter cruise in April, 1934. There is not the slightest evidence that he saw the drill. The District Judge expressly found that Mr. Mooney "did not become aware of any improper drills when he was a passenger in April, 1934" (R. 1337-8).

As to "burden of proof"

The Circuit Court of Appeals described Cabaud and Torresson together as "these officers" (R. 1372), and referred to them as *managing officers*. The Court then proceeded on several counts to condemn petitioner for failing to discharge an assumed burden of proof, implying that petitioner was bound, in respect of various instances of statutory violations which had taken place on the *Morro Castle* at sea, to establish affirmatively a complete nega-

tive of "privity" as a condition of receiving any benefits under the policy. This was notwithstanding that both Cabaud and Torresson as well as many others had testified, and notwithstanding that on all the proofs the District Judge had found that neither Cabaud, the managing officer, nor Torresson, the marine superintendent, was chargeable with fault or privity as concerned the statutory violations. This position of the Circuit Court of Appeals took all life from the policy and made it merely a shadow,—leaving to petitioner no right except to pay premiums—because the burden of establishing the negative proposition, as that burden was applied by the Court, was one impossible to discharge.

The extent to which the Court proceeded on this point is illustrated by its language (R. 1372): "We think it important, therefore, to recall that libellant could not rely on absence of evidence against these officers but was required affirmatively to show that the loss was not caused by their act or neglect." This was notwithstanding that neither Cabaud nor Torresson was on board.

In these circumstances no such burden rests on a petitioner even under the limited liability statute. Why the burden should be heavier in a suit against the underwriter is not explainable, inasmuch as the insurance protection is illusory unless it covers where statutory limitation is denied.

Apparently in recognition of the excess burden thus placed on petitioner, the Court said (R. 1374-5):

"The words of the policy here go somewhat beyond the limitation statute, in that they expressly except liability for loss which arises only from the neglect of the assured or the managing officers of its organization. Torresson's

neglect here was a neglect of the libellant which is inexcusable where dangers at sea are involved and which excludes liability upon the policy"

The Court thus denied recovery to petitioner by imputing Torresson's assumed neglect to petitioner and calling that actual privity.

If it be assumed that there was a neglect on the part of Torresson which would have foreclosed petitioner from limiting liability under the statute, that nevertheless would not justify forfeiture of petitioner's right to recover under the policy. It could only be by some neglect imputed to the assured that a liability could arise at all as a basis for claim under the policy. Torresson's neglect (if assumed) was not as of a *managing officer,* but as a mere *employee agent,* and it was excluded from being privity according to the express and obviously deliberate language of the policy.

The Court could reach its decision only by elevating Torresson to the status of managing officer from his position of employee only. In doing this the Court went directly against the language of the policy, the findings, and against the clear understanding of the District Court and Counsel there (R. 644-5). We quote the remarks in our brief annexed, *infra,* pp. 38-9.

As to reading logs

The principal fault attributed by the Court to Torresson was that he had failed to inspect the log books concerning division of watches (R. 1374). However, it was not disputed that proper instructions had been given to the master concerning division of watches, and that the U. S. Steamboat Inspectors regularly examined the log books and were

satisfied. Furthermore, the District Judge had found (R. 1335) that examination of the log books by Torresson would not have disclosed that instructions on division of watches had not been observed by the master, under whose control that matter rested. No statute or regulation required log entry of the number or names of the men on watch.

Concerning Cabaud, the Court suggested that a broader issue was presented than merely of his actual knowledge of the statutory violations, and indicated that he could not disclaim actual fault or privity therefor by delegation of functions to Torresson without taking steps "to see that his subordinate acts," so that failure of supervision "is neglect upon the part of the company". This emasculated the privity clause by eliminating "actual" therefrom. The Court's comment related to the statement that as concerned division of watches, the ship's logs, open to Cabaud and Torresson, showed consistent violations (R. 1377). This was directly contrary not only to the fact but also to the finding of the District Judge (R. 1335), "However, the log books would not have shown whether the instructions as to dividing the crew into equal watches were observed."

The opinion does not suggest that any incident whatever as to the watches or drills had come to the attention of either Cabaud or Torresson which as matter of foresight (instead of hindsight) should have made them suspicious and have led them to examine the logs and check otherwise on the ship's discipline which was wholly in the charge of the master who was responsible therefor directly to the Steamboat Inspectors. They made their periodical check-ups with apparent thoroughness (see Appendix C).

We do not palliate or belittle the facts developed at the trial concerning violations of the statutes and regulations which had happened on the *Morro Castle* at sea. However, in the absence of a definite motive for examination of the logs by Cabaud or Torresson, in the midst of their multifarious duties, it is not clear why before September 8, 1934, they should have done it for any purpose relating to the policy, which said nothing even remotely relating to the subject. Logs may be over-written or under-written, but in any case the question is not what they state or fail to state, but what the fact was—as indicated by one of the Steamboat Inspectors (R. 678). Certainly failure of Torresson or Cabaud to examine the logs on the subject of watches and drills prior to September 8, 1934, is extremely remote from the policy issue of complicity ("actual fault or privity") in bringing about the disaster. This Court's view on log books was stated adversely to that of the Circuit Court of Appeals in *LaBourgogne,* 210 U. S. 95, 126-7, referred to below.

Difference of Opinion as to effect of the Conviction

By addendum to his opinion, Clark, C. J., showed the Court was not in accord as to effect to be given to the conviction of petitioner and Cabaud under Sec. 282 of the Criminal Code (18 U. S. C. 461) and stated his own conclusions on the problem "in view of its interest and general importance" (R. 77-9):

> "The cases are now in substantial conflict as to the effect to be given to conviction of a crime in a civil action involving the same circumstance * * *. My conclusion was that the conviction should have been treated as direct proof of the company's fault" (R. 1378-9).

A. N. Hand, C. J. with whom Swan, C. J., concurred, said (R. 1380-1) that the criminal judgment:

"ought, in my opinion, to have no effect when the issues determined thereby are not necessarily the same as those involved in the action on trial * * *. The situation is quite different from the one where an issue known to be determined in a criminal action is involved in a civil suit to which the convicted person is a party."

Questions Presented

1. Is a shipowner's policy of protection and indemnity insurance governed as concerns its reference to "privity" by the privity decisions which would be applied in a statutory proceeding under R. S. 4283, notwithstanding difference in wording* and difference in purpose as between the statute and the policy, and where the shipowner's adjudged full liability for which it claims indemnity results from R. S. 4493 (because of shipboard violations of safety statutes and regulations) irrespective of any question of statutory privity?

The Circuit Court of Appeals said (R. 1369), "There seem to be no explicit decisions to guide us as to the meaning of the crucial words in the policy", whereupon it applied decisions and reasoning which might have been

* R. S. 4283 reads "without the privity or knowledge of such owner or owners", etc. The policy reads "the Assured without their actual fault or privity * * * the Assured, or the managing officers of his organization are privy", etc. Thus Vice-President Cabaud, the managing officer, was *included*, but Torresson, the employee marine superintendent, was *excluded*, as concerned *policy* privity, although either one of them could have involved the Company in *statutory* privity under R. S. 4283. *After the fire* an amendment was made to the policy which included Torresson. See p. 4, *supra*.

relevant in a statutory limitation proceeding to this wholly different contractual situation.

2. Is not the assured shipowner under such a policy of insurance entitled to recover indemnity unless the liability in respect of which indemnity is claimed was caused by something in the nature of fraud on its part, e. g., some willful or deliberate wrong?

3. Is the assured shipowner under such a policy of insurance entitled to rely on the ordinary rules of preponderance of proof generally applied to commercial documents, or is he required, as a condition of recovering indemnity, to establish by positive proof a complete negative of everything that the assurer can charge as privity, substantially as would be required under the "did not—could not" rule of *The Pennsylvania*, 19 Wall. 125?

Reasons Relied on for Granting of the Writ

I. The decision of the Circuit Court of Appeals in this case has introduced great uncertainty into the matter of coverage, the protection and risks bargained for, and the obligations which exist as between assurer and assured under protection and indemnity policies. The questions naturally spread into other fields of liability insurance.

The insurance policy here was of a usual form as developed from many years' experience and used both for vessels privately owned and for vessels in which the Government is interested either as owner or mortgagee, the latter particularly where vessels have been constructed with Government aid under the Merchant Marine Act, as was the *Morro Castle*.

There is no branch of the law of shipping or marine insurance more important than protection and indemnity insurance, which was developed to protect shipowners, charterers and operators in a great variety of situations not coverable by ordinary marine policies. Few shipping operations of importance fail to avail of such insurance, which is of such volume that the P. & I. underwriters customarily spread their vast risks by re-insurance on substantially the same terms both in this country and abroad.

The importance of the questions is emphasized by the fact that recently the Circuit Court of Appeals for the Fifth Circuit in *Sabine Towing Co.* v. *Continental Insurance Co. Inc.*, 117 F. (2d) 694, also exonerated the same respondent under different language in a policy privity clause, where statutory limitation of liability had been denied for privity of the president of the assured. That Court was divided, McCord, C. J., dissenting. He concluded, as had the District Court for the Eastern District of Texas,

"The essential purpose of the policy is to protect the owner from loss that may arise through negligence in connection with the operation of its business. The construction placed upon the contested clause by the majority opinion is too narrow and virtually destroys the effectiveness of the policy of insurance" 117 F. (2d) at 702.

We are informed that a petition for certiorari will shortly be presented to this Court in that case.

The decision below makes the policy illusory, a mere shadow, and no protection in various contingencies that suddenly arise in the countless vicissitudes of the shipping industry, not within any direct control and certainly with-

out wrongful purpose on the part of the managerial officers of ship owning or operating corporations.

Tremendous risks are involved in vessel operation and the great and increasing values of vessel property, which if not properly covered would involve many a shipowner or operator in irretrievable financial disaster. Although the claim made on the respondent underwriter in this case is for about $1,114,000, (the claims against petitioner were asserted at upwards of $12,000,000) the policy was for $4,600,000. This figure in itself attested the seriousness of the contract, and a contemplation of the possibility of accidents which would give rise to large liabilities,—liabilities which could only be founded on some neglect to be imputed to the corporate petitioner. In the course of determining such liabilities it seems inevitable that fault should be charged against shore personnel as well as against ship personnel. When liability can be limited under the statute, claim on the underwriter is likewise limited, so it is naturally not for such instances that these larger policies are taken out.

It is greatly in the interest of the commercial community that the questions at issue be reviewed and set to rest by this Court.

The differences in view expressed between the Circuit Judges in this case and betwen the Circuit Judges in the *Sabine Towing Co.* case in the Fifth Circuit, both decisions having reversed those of the respective District Courts, in themselves create an unsatisfactory situation in a matter of such general commercial interest. It is not greatly dissimilar to the effect of contrary decisions as between two Circuits, and is analogous to the diversity of opinion which this Court referred to in *Strochmann* v. *Mutual Life Ins.*

Co., 300 U. S. 435, at 439. The decision in this case unduly confines the protection, according to the insurance trade understanding of this type of policy (R. 212-13, 216-17) and the same appears from the *Sabine Towing Co.* case.

II. The Court in classifying petitioner's employee-agent, marine superintendent Torresson, as a "managing officer" under the policy violated the clear intent and purpose of the policy as developed by amendments over a period of years. The amendments made in the 1935-36 policy, *after* the loss, specifically include a managing agent (*e.g.*, a marine superintendent), as one whose actual fault or privity would defeat recovery by the assured, but before that time he was excluded from that category—which on September 8, 1934 was by the policy limited to a managing officer (Cabaud, but not Torresson).

Comment

It is fundamental that the construction most favorable to the assured as against the assurer preparing a policy "must be adopted" *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144. *Stroehmann* v. *Mutual Life Ins. Co.*, 300 U. S. 435, 439. This principle forbade that the marine superintendent, a mere agent of petitioner, should be transformed into a managing officer for the purpose of attributing fault or privity to petitioner, notwithstanding that he had managerial duties assigned to him by Vice-President Cabaud, managing officer. In *The Galileo*, 287 U. S. 420, 425, a case under the fire statute, Mr. Justice Brandeis referred to "negligence of its *managing officers or agents*" (italics ours) a clear recognition of the distinction between

an "officer" and an "agent." This clear distinction, as of the time of the fire, was recognized expressly by respondent when it amended its 1935-36 policy on the *Oriente* so as to add "or managing agent." That would have been wholly unnecessary if "managing officer" as used in the 1934 policy had not definitely excluded the acts of all others as concerned any questions of policy privity.

It is wholly immaterial in this suit on the policy that the negligence of a "managing agent" can prevent limitation under the statute, as well as the negligence of a "managing officer." That circumstance does not blend the two classifications into one, to the prejudice of the assured, against the carefully worked-out language of the policy itself.

The privity clause should never be so interpreted or applied as to defeat the broad commercial and protective purposes of the policy when fraud is not involved. This emphasizes the indefensibility of making the fault or privity of an "agent" the same for policy purposes as that of a "managing officer," notwithstanding separation of the person classifications in the policy itself.

III. The Court defeated petitioner's insurance contract claim against respondent on the ground raised by it that limitation of liability would have been denied to petitioner on privity grounds under R. S. 4283. The District Court found there was no privity and held that R. S. 4493 prevented petitioner from limiting liability irrespective of any question of privity.

Comment

Strict construction of the limited liability statute which is in *derogation* of the rights of the traveling and shipping public may on occasion be justified in order to avoid inequitable hardship to that public. The situation as between the petitioner and respondent is vastly different and there is nothing to justify *derogation* of petitioner's right to recover by favoring respondent with a restrictive rule of construction to avoid its liability.

The public aspect of the matter is evident from the fact that under Section 109 [now 167] of the New York Insurance Law persons who might establish claims against a carrier (petitioner) had rights to recover under this policy in the event of inability of the carrier (petitioner) to pay their claims. *Hinkle* v. *Globe and Rutgers Ins. Co.*, 271 N. Y. 585.

The P. & I. policy had real and commensurate value to the petitioner only if it covered liability based on losses from which petitioner was not exempt under the limitation statute. Unless such a policy covers a field broader than the statute it is not insurance but a mere sham, and petitioner paid premiums on a $4,600,000 policy to no purpose.

This policy applied to liability that might arise in respect of cargo carried, and other matters, in addition to passenger liability. Both the Harter Act of 1893 and the Carriage of Goods by Sea Act of 1936 exempt the carrier from cargo liability for negligence in managament and navigation. The Fire statute, R. S. 4282 (46 U. S. C. 182) exempts the carrier from liability for loss of cargo by fire, which exemption includes losses due to negligent custody and all other negligence, unless the fire be shown due to the

carrier's design or neglect. P. & I. protection in respect of cargo is thus only required against the negligence of shore personnel or negligence of ship's personnel in care and custody. The regular marine policies take care of collision damage to other vessels, so such damages are not the subject of the P. & I. policy.

It is therefore apparent that the policy would afford little protection against cargo claims if the Court below was right in holding that it protects only where the shipowner can limit liability under the limitation statute.

IV. The Court refused to hold that the only defense to petitioner's claim on the policy would be something amounting substantially to fraud against respondent by petitioner or by its managing officer Cabaud, and that "actual fault or privity" in the policy meant no more or less than this, that is to say, corrupt or evil purpose contributing to the disaster, transcending mere negligence in performance of managerial functions, which negligence could not proximately cause or have more than a remote collateral bearing on the disaster.

Comment

A fair and substantial description of the purpose of protection and indemnity insurance and of the nature of defenses which should prevail against policy claims is given in *Hanover Fire Ins. Co.* v. *Merchants Transportation Co.*, 15 F. (2d) 946, *certiorari* denied 273 U. S. 758, where the Circuit Court of Appeals for the Ninth Circuit said (948):

"The object of this form of insurance is to afford protection to shipowners, in addition to that afforded by the

ordinary marine policy, and the contract should be construed with that object in view. When so construed, we are clearly of opinion that it covered damages paid for loss of life arising from the negligence of the ship or shipowner; for, in the absence of negligence on the part of either, there would be no loss or liability to be indemnified against. And, if the policy covered loss arising from negligence, the courts will not attempt to distinguish between the different kinds or degrees of negligence, unless, as agreed by counsel, the negligence was so gross as to amount to a willful, deliberate, and intentional wrong.

Negligence of the latter class would constitute fraud as against the insurance company."

To like effect is *Sorenson* v. *Boston Ins. Co.*, 20 F. (2d) 640, *certiorari* denied 275 U. S. 554; *Moore* v. *Eagle Star, etc. Ins. Co.*, 5 F. (2d) 385, aff'd 9 F. (2d) 296.

Considering that contracts of insurance should be interpreted and applied broadly to afford to assureds the benefits which alone justify such insurance, there was no reason for the court below to assume that the policy in suit differed in principle from those involved in the cases just cited, notwithstanding the insertion of the privity phrase. That should not have been given any special significance other than as a specific *caveat* in the policy against matters (*i. e.*, fraud, broadly speaking) which would on fundamental principles constitute a defense even without such specific statement. Especially was this true since the privity clause was amended by insertion of "actual" *before* the fire, and by the withdrawal of "actual" *after* the fire.

In *Waters* v. *Merchant's Louisville Ins. Co.* (1837) 11 Peters 213, 221, Mr. Justice Story said:

"There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal fraud."

The remarks of Cardozo, J., then Chief Judge, in *Messersmith* v. *American Fidelity Co.*, 232 N. Y. 161, permitting recovery of liability insurance where the liability arose from injury by an automobile driven by an infant in violation of the Highway Law, show the theory and policy of recovery being granted wherein fraud is not the cause involved. The English Courts hold likewise. *James* v. *British General Ins. Co. Ltd.* [1927] 2 K. B. 311, 321; *Tinline* v. *White Cross Ass'n Ltd.* [1921] 3 K. B. 327, 330-2. Both of these cases involved convictions for manslaughter resulting from gross or criminal negligence, but negligence nevertheless, and not wilful or advertent acts—*i.e.*, not based on fraud or other moral turpitude.

V. The Court held that petitioner had a burden of proof to show and had failed to show that the failure of Cabaud or Torresson to become aware of violations of safety statutes and regulations on the *Morro Castle* was not the actual fault or privity of petitioner within the intent of the policy. It made this conclusion without the slightest evidence, or legal basis, that such non-awareness on their part was, or could be, in any relevant sense a cause ("actual fault or privity") of the liabilities for which petitioner sought to be reimbursed.

Comment

Nothing in the policy specified or suggested that petitioner could be subjected to a burden of proof in the negative sense, *i.e.*, that no recovery could be had unless petitioner should affirmatively establish the negative of every contention set up by respondent as to why its liability

should be avoided. Interpreting the policy in that sense converted it into no insurance at all, and foreclosed that protection by respondent for which petitioner paid premiums.

There is no fair reason to suppose that the phrase "without their actual fault or privity," etc., was other than a description of a proximate cause or causes of loss which, if shown on all the evidence to exist, would avoid protection of the policy. It should not be presumed that in a matter of this importance either the petitioner or respondent intended to hamstring themselves by a mere rule of procedure in a law suit. It is inconsistent with broad rules of common sense that the right of petitioner to recover on the insurance policy should be restricted more by a mere rule of procedure implied from the policy than would be the case in the statutory limited liability proceeding.

It should not be forgotten that the *Morro Castle* liabilities resulted proximately from the fire on board and the several contingencies and events following shortly thereafter, in which neither the petitioner nor Cabaud nor Torresson had any participation whatsoever.

In *La Bourgogne*, 210 U. S. 95, this Court refused to uphold a contention there made for claimants in a limited liability proceeding (97), that an allegation that the loss occurred without privity or knowledge of the petitioner could not be:

"established without proving the negative of any matter of privity or knowledge that is put in issue."

In the 1936 Carriage of Goods by Sea Act, 46 U. S. C. 1304, specifications are made in Sec. 4 as to burden of

proof when certain exemptions are claimed. See Brief at pp. 42-3. Petitioner should surely be in no less favorable position under the policy than it would be under that statute.

What the Court below in reality did was to subject the petitioner to the "did not-could not" rule in cases of statutory fault as expressed in *The Pennsylvania,* 19 Wall. 125. The decision in *Richelieu & Ontario Nav. Co.* v. *Boston Marine Ins. Co.,* 136 U. S. 408 cited below, (R. 1371) was based on *The Pennsylvania.* The stranding in that case was by the applicable Canadian statute "deemed to have been occasioned by the wilful fault of the person in charge" (422). As the policy expressly excepted perils occasioned by want of ordinary care or seaworthiness, the rule of *The Pennsylvania* was naturally applied (423); in other words, violation of the Canadian statute against excessive speed raised a *prima facie* case of negligent navigation and the policy excluded negligent navigation. The same comment applies to the other cases relied on by the court below at R. 1371.

"Mutilating narrowness" ought to be avoided as well in respect of contracts as of statutes, and the purpose of the contract as well as of a statute should be the main regard. *United States* v. *Hutcheson,* 61 Sup. Ct. Rep. 463, 467; *Warner* v. *Goltra,* 293 U. S. 155.

VI. The Court attributed a causal effect amounting to "actual fault or privity" in respect of the liabilities incurred by petitioner *in the sense of the policy,* to failure of petitioner's marine superintendent, Torresson, to examine the logs of the *Morro Castle* on the subject of division of watches and drills and to failure of managing officer

Cabaud to supervise him in that respect, notwithstanding that proper instructions had been given to the master on that subject, notwithstanding the absence of any incident to indicate that the master was failing to observe the instructions, and notwithstanding that this matter was under the jurisdiction of the U. S. Steamboat Inspectors to whom the master reported regularly, and who examined the logs.

Comment

The District Judge found that examination of the logs would not have shown whether the law as to division of watches was being violated on shipboard or not (R. 1335). It was not a violation of any statute or regulation for the master not to enter in the log the number or names of men on watch. Keeping of the logs and control of the same were for the master under R. S. 4290, 46 U. S. C. 201-203. The entries prescribed to be made do not include the number or names of men on watch.

The opinion clearly errs in stating (R. 1377) that "the ship's logs, equally open to Cabaud as to Torresson, show consistent violations." All that an examination of the logs would have shown was that Torresson's instruction to the master to show division of watches with entry of names in the log was not carried out, not that there had been any violation of law. This instruction as to entry of names was voluntary on the part of Torresson, it was not required by the statute or any regulation. There is nothing to suggest that it was known to Cabaud.

In the absence of any incident calling for particular attention, it is not apparent why Torresson or any other sub-

ordinate (much less Cabaud) should have scrutinized the logs. It should be remembered that the operation of the *Morro Castle* had been smooth and successful, and without special incident.

Whether a log is written up full or scant depends largely on the disposition and direction of the particular master. Overwriting of a log, if that sometimes happens, does not establish facts, nor does scant writing controvert them.

There is no suggestion in the case at bar that promulgation of instructions as to division of watches on the *Morro Castle* was not done in good faith, or that a willful departure from such instructions by the master was brought home to or countenanced by petitioner. This Court's decision in *La Bourgogne,* 210 U. S. 95, 126-7, shows that petitioner had fully done its part, and was not in privity as concerned the respondent by reason of what the log books failed to show either one way or the other in respect of whether the watches on shipboard had been properly divided or not, or in respect of other matters.

VII. The Court did not give due weight to but disregarded, the findings of the District Judge under Admiralty Rule 46½, and substituted its own views which were to the contrary of said findings.

VIII. The Court erroneously failed to pass on petitioner's cross-assignments of error (R. 1355-7).

Petitioner annexes a brief hereto.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of

Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its dockets "No. 116 October Term 1940, New York and Cuba Mail Steamship Company, Libellant-Appellee, against The Continental Insurance Company of the City of New York, Respondent-Appellant," and that the decision of the said Circuit Court of Appeals in said case be reversed, and that your petitioner have such other and further relief as in the premises may be just.

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY

By ROSCOE H. HUPPER
CHAUNCEY I. CLARK
Counsel

Certificate

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

ROSCOE H. HUPPER
Counsel
27 William Street
New York City

New York City
April 24, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY
Petitioner
(Libellant-Appellee)

AGAINST

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK
Respondent
(Respondent-Appellant)

BRIEF IN SUPPORT OF PETITION

FIRST POINT

The Circuit Court of Appeals was in error in applying to this contract suit principles which as concern privity would be applicable only in a limited liability proceeding under the statute.

The Circuit Court of Appeals said: "There seem to be no explicit decisions to guide us as to the meaning of the crucial words in the policy" (R. 1369). And it recognized that "the analogy between a statutory provision for limited liability and a contract by a paid insurer to relieve its promisee of loss should not be pressed too far" (R. 1369). Nevertheless, in reversing the District Court, the Circuit

Court of Appeals relied upon privity decisions under the limited liability statute which are applicable only in a proceeding under that statute.

Both the Harter Act of 1893 and the Carriage of Goods by Sea Act of 1936 exempt the carrier from cargo liability for negligence in management and navigation. Therefore, P. & I. protection in respect of cargo is only required against the negligence of shore personnel or negligence of ship's personnel in care and custody. The regular marine policies take care of collision damage to other vessels, and so such danger is not the subject of the P. & I. policy. The Fire statute, R. S. 4282 (46 U. S. C. 182) exempts the carrier from liability for loss of cargo by fire, which exemption includes losses due to negligent custody or other negligence, unless the fire be shown due to the carrier's design or neglect.

It is therefore apparent that the policy as construed by the Circuit Court of Appeals would afford substantially no protection against cargo claims except in relatively minor cases.

Contracts of insurance should be interpreted and applied broadly to afford to assureds the benefits which alone justify such insurance. Insertion of the privity clause in the policy should not have been given any special significance other than as a specific *caveat* in the policy against matters (*i. e.*, fraud, broadly speaking) which would on fundamental principles constitute a defense even without such specific statement. Certainly it should not have been assimilated to the privity clause in R. S. 4283.

It is appropriate to say of the insurance policy in suit, as was said by this Court in respect of the Clayton Act, *United States* v. *Hutcheson*, 61 Sup. Court Rep. 463, 467-8:

"Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 391, 59 S. Ct. 516, 519, 83 L. Ed. 784, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' Johnson v. United States, 1 Cir., 163 F. 30, 32, 18 L. R. A., N. S., 1194."

In *Warner* v. *Goltra,* 293 U. S. 155, this Court held that the master of a tugboat should be regarded as a seaman within Section 33 of the Merchant Marine Act of 1920. Mr. Justice Cardozo said, at 156, in reference to *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50:

"None the less, verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships."

The words of the statute were understood and applied in contemplation of its remedial purpose. So should the words of this insurance policy be understood, to make its protective purposes effective.

SECOND POINT

Petitioner's marine superintendent (Torresson) was not an officer or a managing officer of petitioner under respondent's protection and indemnity policy of insurance.

The Circuit Court of Appeals held that Torresson was a managing officer (R. 1369-71) and condemned petitioner because of Torresson's assumed negligence in respect of various instances of statutory violations at sea which took place on the *Morro Castle*. In other words, the Circuit Court of Appeals has required petitioner to establish affirmatively a complete negative of privity on the part of Torresson, an employee, as a condition of receiving any benefits under respondent's policy. This was notwithstanding that on all the proofs the District Judge had found that neither Cabaud, the managing officer, nor Torresson, the marine superintendent, was in fault or privity to the statutory violations or liabilities following from the fire (Finding 11, R. 1335).

If it be assumed that there was neglect on the part of Torresson which would have foreclosed petitioner from limiting liability under the statute, that would not justify forfeiture of petitioner's right to recover under the policy. We do not question that under the limitation statute the privity of certain employees, not "officers", may constitute privity on the part of the corporation. See *The Erie Lighter 108*, 250 Fed. 490; *In re Spencer Kellogg & Sons, Inc.*, 285 U. S. 502. However, it does not follow that such employees are promoted to be officers of the corporation merely because privity on their part may prevent limita-

tion under the limitation statute. It could only be by some neglect of the assured (petitioner) that a liability could arise at all as a basis for claim under the policy. Clearly Torresson's assumed neglect, as referred to by the Circuit Court of Appeals, was not as a *managing officer*, but as a mere employee agent, and it could not possibly save the respondent from liability according to the express and deliberate language of the policy. In brief, the Circuit Court of Appeals could reach its decision only by elevating Torresson, an employee, to the status of "managing officer".

This error which found its way into the opinion of the Circuit Court of Appeals can be traced to the brief filed by respondent in that Court. There respondent bracketed Torresson with Cabaud and argued that Torresson was a managing officer. This was directly in the teeth of what transpired upon the trial* in the District Court, where this very point was raised and counsel for the respondent did not even contend that Torresson was an officer, and the District Court said:

"The Court knows that the witness Mr. Keating described as an officer (Torresson) was not an officer" (R. 645).

In order that there may be no misunderstanding as to this we set forth the remarks of counsel and Court on this issue (R. 644):

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* Torresson testified:

"Q. Mr. Torresson, are you an officer of the corporation? A. No, sir, I am not.

Q. Were you in 1934? A. No, sir, I was not" (R. 658).

There is no evidence whatever in the record contradictory of this.

"Mr. Clark: If your Honor please, Mr. Keating said 'to the officers of the company, including yourself.' Well, I don't know whether he intends to make this witness an officer in his question, referring to him as an officer.

Mr. Keating: Well, I will leave out that word. He was managing agent.

Mr. Clark: Make him just what his testimony shows, marine superintendent. I object to Mr. Keating making him an officer by putting that word in his questions.

The Court: Mr. Clark, I think you are right. As a matter of fact merely because a lawyer characterizes a man a president or officer of the corporation does not make him so.

Mr. Keating: Of course so.

The Court: And I think any judge in writing an opinion would regard the fact rather than the mere question of counsel.

Mr. Keating: I think it appears clearly what this man's duty was.

The Court: He was marine superintendent.

Mr. Keating: Yes.

Mr. Clark: I can also visualize, your Honor, Mr. Keating's brief where he says he was an officer of the corporation and quotes the question and the witness' answer and so forth. He will say he admits he is an officer.

The Court: That wouldn't be a good point. I don't think that would rest on very firm foundation. The Court knows that the witness Mr. Keating described as an officer was not an officer."

The principle that the construction most favorable to the assured as against the assurer preparing the policy was recently reasserted by this Court in *Stroehmann* v. *Mutual Life Ins. Co.*, 300 U. S. 435, 439, where it was said:

"In *Mutual Life Insurance Co.* v. *Hurni Packing Co.*, 263 U. S. 167, 174, this Court said: 'The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is consistent

with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it.' See *Royal Insurance Co.* v. *Martin*, 192 U. S. 149, 162, 165; *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, 492."

See also *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144.

These decisions forbade that the marine superintendent, a mere agent of petitioner, should be transformed into a managing officer for the purpose of attributing fault or privity to petitioner, whether or not he had managerial duties assigned to him by Vice-President Cabaud, managing officer.

In *The Galileo*, 287 U. S. 420, 425, a case under the Fire statute, Mr. Justice Brandeis referred to "negligence of its *managing officers or agents*" (italics ours) thus distinguishing between a "managing officer" and a "managing agent."

The word "officer" has a definite and distinctive meaning—one holding a position created by the charter or by-laws and elected by the board of directors. An employee or agent is selected by officers. "Agent" also has a distinctive meaning; there is no doubt that an employed marine superintendent is an agent, and may have duties which constitute him a managing agent, and that his negligence may prevent the corporation from limiting its liability, but this does not make such marine superintendent an officer of the corporation. The limitation statute, R. S. 4283 makes no classification in respect of the persons whose fault when imputed to the owner will deprive him of the benefits of the statute. But the *policy* did make such a classification. If respondent desired to class managing agents with managing officers (as it did *after* the fire) respondent should have so bargained and so specified in its contract of insurance.

THIRD POINT

The Circuit Court of Appeals was in error in charging petitioner with a burden of proof not stipulated for or contemplated by the policy which subjected petitioner to the burden, impossible in any event to discharge, to prove the negative of all charges that could be made against it in respect of privity.

In *La Bourgogne,* 210 U. S. 95, this Court refused to uphold a contention there made for claimants in a limited liability proceeding (97), that an allegation that the loss occurred without privity or knowledge of the petitioner could not be:

"established without proving the negative of any matter of privity or knowledge that is put in issue" and that "the petitioner must prove not only the ultimate fact, but also such subsidiary facts as may be necessary to found the conclusion that is to be established."

Nothing in the policy specified or suggested that petitioner could be subjected to a burden of proof in the negative sense, *i.e.,* that no recovery could be had unless petitioner should affirmatively establish the negative of every contention set up by respondent as to why its liability should be avoided. That is to say, the Court below required that petitioner prove that anything that Cabaud or Torresson did or failed to do could not have contributed to the liability of petitioner. Interpreting the policy in that sense converted it into no insurance at all, and deprived petitioner of the protection for which petitioner paid premiums to respondent.

In *Waters* v. *Merchant's Louisville Insurance Company*, 11 Peters 213, the question was whether the insurance against risk of fire would be defeated when the fire was remotely caused by negligence, there being no exception of negligence in the policy. The language of Mr. Justice Story there (11 Peters 221-2) is apposite here in respect of the proof of negatives imposed on petitioner by the Circuit Court of Appeals. He said:

"If negligence of the master or crew, were under such circumstances a good defence, it would be perfectly competent and proper to examine on the trial any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage; for all these might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided or escaped, or never encountered at all. *Under such circumstances, the chance of a recovery upon a policy for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard.* (Italics ours.)

This is not all: we must interpret this instrument according to the known principles of the common law. It is a well established principle of that law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause".

Definitely opposing the position taken by the Circuit Court of Appeals are the provisions of the Carriage of Goods by Sea Act of April 16, 1936, 46 U. S. C. 1304, granting exemptions to carrier and ship from liability for losses from various specified causes. Sec. 4(2) (q) provides:

"Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of

the agents or servants of the carrier, but the *burden of proof* shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." (Italics ours)

This is in contrast with exemption (b) in the same section, as follows:

"Fire, unless caused by the actual fault or privity of the carrier;".

It is also in contrast with Sec. 4 (3) which reads:

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or servants."

Sec. 4 (1) also emphasizes the contrast, as follows:

"Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy. * * *. Whenever loss or damage has resulted from unseaworthiness, *the burden of proving* the exercise of due diligence shall be on the carrier" etc. (Italics ours)

Respondent's P. & I. policy cannot reasonably be interpreted and applied less favorably to petitioner than the laws, passed by Congress to protect shippers, provide for as matter of course.

FOURTH POINT

The Circuit Court of Appeals erred in holding that the failure of marine superintendent Torresson to examine the logs of the Morro Castle in respect of division of watches and drills, and the failure of managing officer Cabaud either to examine the logs himself or to supervise Torresson in that regard, constituted actual fault or privity on the part of petitioner as concerned the liabilities for which it sought reimbursement.

The U. S. Steamboat Inspectors regularly examined the log books and found them satisfactory. The District Judge found that examination of the logs would not have shown whether the law as to division of watches was being violated on shipboard or not (R. 1335). It was not a violation of any statute or regulation for the master not to enter in the log the numbers or names of men on watch. Keeping of the logs and control of the logs were for the master under R. S. 4290 (46 U. S. C. 201-3).

Furthermore, there is no dispute that the erroneous division of watches was made upon orders of the master, nor that proper written instructions as to the statute had been given the master by Torresson (Finding 11, R. 1335). The District Court found that neither Torresson nor Cabaud knew of the master's violation of these instructions (R. 1335).

In event of damage on or relating to the ship, and possibly involving repair, it would have been natural for Torresson to examine the log of the particular voyage involved to find out what contemporaneous relevant information might be noted therein. Likewise, another sub-

ordinate, perhaps in the Claim Department, might well examine the log for comparable information in relation to claims asserted for damage to another vessel, for personal injury or for damage to cargo etc. But aside from events of this general nature, and in the absence of any incident calling for particular attention, it is not apparent why Torresson or any other subordinate (much less Cabaud) should have scrutinized the logs.

In *La Bourgogne,* 210 U. S. 95, the contention was made for claimants that because logs as demanded by them had not been produced by petitioner, and because it might be assumed that such logs if produced would disclose knowledge in the petitioner of a practice of immoderate speed in fog (claimed to amount to "privity or knowledge") therefore limitation of liability should be denied. This Court rejected that contention. It appeared in that case that the petitioner had promulgated regulations requiring its masters to comply with the International Rules. This Court said 210 U. S. at 126-127:

"The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a willful departure from their requirements was indulged in, and was brought home to or countenanced by the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence."

Again, the Circuit Court of Appeals disregarded the finding of the District Court as to drills held on board the *Morro Castle,* remarking that "there are not the proper detailed logbook records of whatever drills occurred" (R. 1375). Although the District Court found that petitioner

was not privy to the failure of the ship's officers to comply with the statutes and regulations as to fire and boat drills (Finding 13, R. 1338), the Circuit Court of Appeals, erroneously stating that Mr. Mooney, president of petitioner company, "saw one drill but was not called" (R. 1375), decided that "this affirmatively indicates fault and privity" (R. 1376). There is no evidence whatever that Mr. Mooney witnessed a drill at any time, or was even on deck at any time a drill was held. The District Court so found (R. 1318, 1337-8).

It is true that detailed entries were not made in the ship's logs *i. e.* the entries state the day of the month, but not the length of time of the drill, number of boats swung out, number of lengths of hose used and the condition of all fire and life-saving apparatus. However, writing out a detailed entry in the log does not make a perfect drill, and the converse is equally true. Because the entry in the log reads merely "held fire and boat drill", this does not mean that the drill was not properly held. As was proved on the trial, although the details do not appear in the log, it was established beyond doubt that they were attended to (see testimony of the U. S. Steamboat Inspectors Moffat and Martin, Appendix C).

Furthermore, responsibility for drills is placed by the statute and regulations directly upon the master and the U. S. Steamboat Inspectors. Cabaud, being aware of the quarterly inspections and the master's monthly reports under oath, was, in the absence of complaint, entitled to rely upon these as evidence that the drills were properly conducted and the crew properly trained. Nor is it true, as contended by respondent that the log entries as to drills are required to enable the managing officers of the owner

to check up on the fire and boat drills. The purpose is to enable the U. S. Steamboat Inspectors to check up on the performance of these duties by the ship's officers (See Appendix C, testimony of Moffat and McLintock, R. 676-80 and 761-66). In Rule V-18 of the regulations, the paragraph requiring log entries of drills immediately follows a paragraph setting forth "the duty of the Inspectors" and immediately precedes a paragraph requiring the master to make monthly reports of the drills.

Duty of U. S. Steamboat Inspectors* to see that requirements as to drills be carried out

The regulations provide that it shall be the duty of the U. S. Steamboat Inspectors to require the officers and crew to perform the drills and discipline the crew in the presence of the Inspectors at intervals sufficiently frequent to assure the Inspectors by actual observation that the requirements are complied with. That the Inspectors carried out the requirements of the regulations is clear from their testimony and the District Court so found (see testimony, Appendix C, Finding 13, R. 1337).

Cabaud knew that the Inspectors were required to satisfy themselves by actual observation that the requirements of the statute and regulations were being complied with (R. 980). Notwithstanding the direct testimony to this effect and the finding of the District Court, the Circuit Court of Appeals concluded that improper drills "affirmatively indicates fault and privity" (R. 1376), a clear *non sequitur* because, in order to show fault and privity, knowledge of

* Sometimes referred to as "Local" Inspectors.

improper drills must be brought home to petitioner, which was not done. Indeed, the Circuit Court of Appeals thought it important that Cabaud saw an incomplete drill "while at sea" (R. 1375-6). This was fully explained although the Court overlooked the explanation. The Court set forth the explanation as follows:

"Cabaud saw an admittedly incomplete one (drill) while at sea but says Captain Willmott explained that the boats were damaged" (R. 1375-6).

The proved explanation was that because boats had *previously* been damaged in lowering at sea he (Willmott) was lowering the boats and exercising the crew at Havana (R. 721). There can be no criticism of this which was in accordance with the Statute (R. S. 4488, 46 U. S. C. 481), which provides that drills should be held at least one a week "either in port or at sea". And the log shows that the boats were lowered at Havana on May 22, 1934 (Ex. J-3, R. 1358).

Master's monthly report of drills and condition of vessel and equipment

The regulations require the master of passenger vessels to report the day and date of exercise and drill of the crew, the condition of the vessel and her equipment. This report is required to be made to the U. S. Inspectors at the port where the vessel was last inspected. There is no doubt that these reports were made monthly by the *Morro Castle's* master to the Inspectors. The available reports have been marked as one exhibit (Ex. 54, R. 877). Nor can there be any doubt that any failure of the master to make the reports

or any inadequacy disclosed by the reports would inevitably have brought complaint to the shipowner from the Inspectors. There is no suggestion that any complaint was made by the Steamboat Inspectors.

FIFTH POINT

The decision of the Circuit Court of Appeals is contrary to the established rule of the Circuit Courts of Appeals that on questions involving the weight of the evidence the decision of the District Judge, who heard and saw the witnesses, will not be disturbed unless clearly erroneous.

The fact findings of the District Judge under Admiralty Rule 46½ that on all the evidence petitioner was free from actual fault or privity in any sense contemplated by the policy were entirely disregarded by the Circuit Court of Appeals. In so doing the Court disregarded not only its own well established admiralty rule, but also that of the other Circuit Courts of Appeal. In *McAllister Brothers, Inc.* vs. *Pennsylvania R. R. Co.*, 118 F. (2d) 45 (C. C. A. 2), decided March 3, 1941, the same Court said:

"The only question on this appeal is the sufficiency of the evidence to support the findings on which that conclusion was based. Though the appeal brings the issues before us *de novo*, yet the well settled rule is that the court's findings must stand unless they are clearly against the preponderance of the evidence. City of Cleveland v. McIver, 6 Cir., 109 F. 2d 69; The A. G. Brower, 2 Cir., 220 F. 648; The City of Augusta, 1 Cir., 80 F. 297."

In the Ninth Circuit the Circuit Court of Appeals in *The Andrea F. Luckenbach*, 78 F. (2d) 827, 828, said:

"* * * The well-established rule is applicable that the decision of the trial court in admiralty cases upon contro-

verted questions of fact will not be disturbed by the appellate court unless clearly against the weight of the evidence. * * * "

To the same effect are: *Philippine Sugar C. Agency* v. *Kokusai Kisen, etc.*, 106 F. (2d) 32, 35 (C. C. A. 2); *The James Watt*, 61 F. (2d) 783, 785 (2 C. C. A.); *Merchants' and Miners' Transp. Co.* v. *Nova Scotia S.S. Corp.*, 40 F. (2d) 167, 168 (1 C. C. A.); *Tomkins Cove Stone Co.* v. *Bleakley Transp. Co.*, 40 F. (2d) 249, 252 (3 C. C. A.); *Virginia Shipbuilding Corp.* v. *United States*, 22 F. (2d) 38, 51 (4 C. C. A.).

SIXTH POINT

The Circuit Court of Appeals erred in failing to determine the propositions raised by petitioner's cross-assignments of error, and in failing to grant petitioner a decree for all its damages and all its expenses in accordance with the provisions of the policy, without limitations implied from Conclusions 5, 6 and 7 of the District Court.

Petitioner filed cross-assignments of error (R. 1355-7) directed principally to Judge Goddard's conclusions of law 5, 6 and 7 (R. 1341). These conclusions conceivably limit the full recovery permitted by the policy. Finding 2, R. 1330-1, specifies the recovery provisions—which include not only liability for loss of life and personal injury, and for loss or damage to property, but also liability for hospital, etc. expenses, and costs, charges and expenses reasonably incurred and paid by assured in defense against liabilities insured against.

At the trial it was stipulated that a settlement had been made and paid by petitioner, covering all its liabilities to claimants; that it had incurred and paid various disbursements and legal expenses in connection with the claims; and that the settlement disbursements and legal expenses were to some extent proper items of damage in event recovery was allowed. The stipulation provided also that consideration of the amount of any recovery by petitioner should be postponed until after the trial on the merits (Stipulation, R. 25).

The settlement of claims was negotiated with a Committee of Proctors representing all claimants. See the decision of the Circuit Court of Appeals in *Hyman* v. *Pottberg's Ex'rs,* 101 F. (2d) 262.

It was not in order for the District Judge to make any conclusions which might have the effect of prohibiting the Commissioner from dealing with all of petitioner's claims in respect of damages, or of raising a controversy before him concerning his authority. Petitioner should not be denied opportunity to prove before the Commissioner that the full settlement of $890,000 made by it was no more than the amount of petitioner's liabilities.

The policy provided that petitioner should "take such steps to protect his (and/or the assurers') interests as would reasonably be taken in the absence of this or similar insurance" (Finding 2, R. 1331). Inasmuch as respondent did not coöperate in the matter of settlement even to the extent of expressing an opinion thereon when requested, but "repudiated all liability under said policy with respect to the aforesaid matters" (Finding 17, R. 1339), respondent should not be permitted to raise any objection to the

full amount of the settlement. Petitioner had no alternative but to settle. Reasonable compromises in certain situations are entirely proper, and liabilities are established thereby. See *Kokusai, etc.* v. *Columbia Stevedoring Co., Inc.*, 23 F. Supp. 403, 406, aff'd 100 F. (2d) 1016.

Petitioner's right to show the complete situation concerning damages before the Commissioner is the more apparent because the policy distinctly provided coverage in respect of crew and cargo claims and the expenses of defense thereto.

Whatever might have been the result of further defense in the statutory limitation proceeding as against crew and cargo claims, the expenses incurred by petitioner up to the time of settlement would not have been lessened by further defense, but would have been increased. Since the policy covered the expense of defending cargo and crew claims as well as all others, the expenses are all recoverable in any event and in full (not on any limitation basis), irrespective of whether it would have turned out that there was no legal liability, or only limited liability, or full liability upon these claims, or any others.

The District Court failed to make any conclusion directed to recovery of petitioner's expenses of one kind and another, notwithstanding that the same are distinctly specified as covered by the policy. A conclusion was proposed by petitioner (but not granted) as follows (R. 1356):

"5. Libellant became entitled to recover from respondent under its protection and indemnity policy of insurance No. C2336, all such loss and/or damage and/or expense as libellant became liable to pay and did pay of the descriptions set forth in said policy, together with interest and costs."

Such a conclusion would not prejudice respondent, because petitioner's recovery thereunder could not exceed the amount of its liabilities and expenses insured by the policy.

LAST POINT

It is respectfully submitted that the writ should be granted and the decision of the Circuit Court of Appeals be reversed, and that the decree of the District Court be so modified as to grant petitioner its full damages according to the settlement made with the claimants, together with its expenses and interest and costs.

ROSCOE H. HUPPER
CHAUNCEY I. CLARK
Counsel for Petitioner

New York City
April 24, 1941.

APPENDIX A—From R. 1330-41.

Findings of Fact and Conclusions of Law Under Supreme Court Admiralty Rule 46½.

FINDINGS OF FACT.

1. On or about March 1, 1934, respondent, a New York corporation, insured libelant, a Maine corporation, by its protection and indemnity insurance policy No. C 2336 in the amount of $4,600,000, which covered the steamship *Morro Castle,* of which libellant was bare boat charterer and operator, for the period from February 20, 1934 to February 20, 1935.

2. Included in said policy were the following provisions:

> "The Assurers hereby undertake to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expenses as the Assured, without their actual* fault or privity, shall have become liable to pay and shall pay as shipowners or as having an interest in the vessel named herein on account of the liabilities, risks, events, happenings and/or occurrences herein set forth:
>
> "(1) Liability for loss of life of, or personal injury to, or illness of, any person, * * *
>
> (2) Liability for hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew or any other person. * * *
>
> (8) Liability for loss of, or damage to, or in connection with cargo or other property, including mail and parcel post, including baggage and personal effects of passengers, * * *.
>
> (14) Costs, charges, and expenses, reasonably incurred and paid by the assured in defense against any

liabilities insured against hereunder in respect of the vessel named herein. * * *

General Conditions and/or Limitations.

* * * that in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take such steps to protect his (and/or the assurers') interests as would reasonably be taken in the absence of this or similar insurance."

* * * * * *

"The Assurers shall not be liable to the Assured for any loss, damage, or expense to which the Assured, or the managing* officers of his organization are privy, or which arises from his or their act or neglect."

3. In the 1933-34 protection and indemnity policy issued by respondent to libelant the word "actual" was also inserted before "fault or privity" [in the first paragraph of provisions above quoted], but did not appear in other previous policies issued by respondent to libelant covering said steamship. The word "managing" [in the last paragraph of provisions above quoted] was inserted in typewriting also in the 1931-32, 1932-33 and 1933-34 protection and indemnity policies issued by respondent to libelant covering said steamship. Therefore, at the time of the fire hereinafter mentioned, September 8, 1934, the scope of "fault or privity" was limited by the insertion of "actual" and those officers whose act or neglect might charge the corporation with privity was limited by the insertion of "managing."

4. The *Morro Castle* was a twin screw turbo-electric passenger and freight steamship 508 feet long, 70 feet 9 inches beam, built in Newport News, Virginia, in 1930, and was operated on the route from New York to Havana and

return. She was equipped with modern fire-fighting equipment, which included 42 fire hydrants located in various parts of the ship. These were served by three pumps—two electrically driven and a steam pump, capable of a total discharge of 600 gallons of water a minute, which when operated at capacity, could supply any six hydrants with full pressure at the same time. The Steamboat Inspection regulations required only 200 gallons a minute for a ship of her size. She was also equipped with 105 fire extinguishers which, in number and type, conformed to the regulations. The *Morro Castle* had been built in 1930 with the aid of a construction loan granted under the Merchant Marine Act of 1920 as amended, which provided that vessels so built "shall be fitted and equipped with the most modern, most efficient, and the most economical engines, machinery and commercial appliances." Her specifications were subject to approval by the Government and she was constructed by first class shipbuilders. She had the most modern and approved equipment, and passed satisfactorily the inspection conducted frequently by the various departments of the Government, the last one in August 1934. She carried the requisite number of life boats on Maclachlan davits. These boats were properly equipped, in good condition, and had been inspected and tested by the United States Local Inspectors in February, May and August, 1934. Her required crew under certificate of inspection was 67, but she was allowed 170 additional crew, and at the time of the fire carried a crew of 231.

5. The master and officers of the *Morro Castle* were men of many years' experience and long in the service of the libelant and their records and qualifications indicated that they were competent to be placed in charge of her. The libelant was not negligent in the selection of the crew. At 7:45 P. M., September 7, 1934, the master, Robert R. Willmott, died of "acute indigestion and heart trouble."

Except for an attack of acute indigestion on August 30, 1934, the medical reports of the *Morro Castle* show that he had not been ill during the preceding two years. His condition was not suspected to be serious and his sudden death was a surprise and shock to everyone.

6. Upon Captain Willmott's death, the command of the *Morro Castle* was taken over by First Officer Warms, who had entered the employ of libelant or allied companies in 1909 as third officer and from then on was successively and almost continuously an officer or in command of other vessels. He was an experienced and competent officer.

7. At 2:10 A. M. September 8, 1934, while the *Morro Castle* was off the New Jersey coast, proceeding to New York, a fire of undetermined origin was discovered by a passenger in a locker in the writing room port side forward of B deck. At this time Warms, acting master, and the second officer were on the bridge in charge of navigation; the quartermaster was at the wheel and an A. B. was standing lookout on the bridge. Although the fire was discovered at 2:10 it was not reported to the bridge until shortly before 3 o'clock. Apparently some members of the crew had attempted to extinguish it without calling for aid and when the crew was called on deck the fire had made such headway that it is doubtful if it could have been extinguished. Hose was broken out on the starboard sides of A and B decks; also on C deck. The passengers were ordered aft to the lower decks to get them away from the fire. By the time it was realized that the fire was out of control it had spread to such an extent that it had cut off many of the passengers from access to the boats, many of whom were compelled to jump into the sea to escape the fire.

8. The cause of the fire has never been discovered. Neither libelant nor its Managing Officer Cabaud was re-

sponsible for it. The losses were not so much due to the small fire which was discovered at 2:10, but to the failure of the *Morro Castle's* officers and crew to make prompt and sufficient use of the facilities which the ship provided for extinguishing the fire and protecting the passengers and ship; to the delay of some forty-five minutes in reporting it to the bridge; and to the violations of the safety statutes and regulations by the officers in charge of her.

9. No radio distress signal was sent out until 3:15 and then only a "stand by" signal, and not until 13 minutes later was an "S.O.S." sent, although there were several vessels in the vicinity—one, the *Andrea Luckenbach* within three miles. Six life boats having a capacity of 408 passengers were launched, but after the boats were lowered into the water their crews had great difficult in manoeuvering the boats so as to keep them near the ship or to pick up those in the water. Ten passengers and 87 of the crew escaped in the *Morro Castle* life boats. Other passengers and members of the crew, who jumped overboard, were saved by life boats from other vessels which came to the rescue. The result of the disaster was that of the 318 passengers on board, 81 were dead and missing and 34 members of the crew of 231 were dead or missing, and the *Morro Castle* became a total wreck.

10. The proper location of the fire extinguishers was in various places on board which had been selected by the United States Local Inspectors, but at the time the fire was discovered and in violation of the regulations there were no extinguishers on B deck, for on the day previous, on orders from the boatswain, the extinguishers belonging on B deck had been removed for polishing and instead of returning them to B deck, as they should have been, they were wrapped in cloths and placed in the crew's companionways so that they would be protected from the salt air and be

bright when they were returned to their proper places before the vessel docked.

11. The libelant admitted and I find that the requirements of Title 46 U. S. C. A. §673 as to the division of the sailors into watches were violated on the *Morro Castle.* Eleven A. B. Seamen and three ordinary seamen were customarily assigned to day duty—cleaning and painting the ship and were not divided into watches at all, and only nine men were divided into watches, so that between 4 P. M. and 6 A. M. there were only nine men available who were divided into three watches, each watch consisting of a quartermaster, an A. B. seaman, and an ordinary seaman. The division of watches which was made was pursuant to instruction of Captain Willmott. On December 14, 1926 Marine Superintendent Torresson sent written instructions to masters of all the company's ships informing them of the recent decision of the Department of Commerce requiring that the members of the crews be divided into equal watches and called for "strict compliance with the rule". In September, 1930 similar instructions were again sent to the masters of the company's ships. Warms acknowledged in writing their receipt and these orders went into the *Morro Castle's* "Instruction Book" which Willmott took over with the vessel soon after, and formed a part of the company's permanent instructions to the master in charge. Torresson said that so far as he knew these instructions were carried out, although he did not examine the log books which were kept in his office. However, the log books would not have shown whether the instructions as to dividing the crews into equal watches were observed. Violations of these instructions were not known to Cabaud or to Torresson.

12. Although the certificate of inspection required that the *Morro Castle* carry three watchmen, seven men were

signed on as watchmen, but not "all watchmen" were under the direct charge of the master or officer in charge of the vessel, for only three of these were under such charge. This was a clear violation of the regulation that "all watchmen shall be under the direct charge of the master or officer in command * * * and each shall report to the officer in command at the pilot house at fixed intervals of not longer than every hour". The arrangement of watchmen was made by the *Morro Castle's* officers and was not known to Cabaud or to Torresson.

13. The fire and boat drills aboard the *Morro Castle* were inadequate and failed to comply with the provisions of Title 46 U. S. C. 481 and Rule 5, subdivision 18 of the Board of Supervising Inspectors. When an alarm for a fire drill sounded it was the practice of the *Morro Castle* for the forward mooring gang to go to the forward part of the ship and for the after mooring gang to gather in her after part and to put one hose in each of the two places in operation. No other members of the crew went to fire stations. Some of the members of the crew were not familiar with the mechanism for releasing the life boats and lowering them into the water; others did not know how to row.

My opinion contains the following paragraph (page 20):

> "Twenty-four men in the engineer's department alone had no stations assigned to them on the 'Fire Quarters Bill' and many other members of the crew had no stations assigned to them, or if assigned to them, were ignorant of it".

But after carefully reviewing the testimony, I find that each member of the crew did have a fire station, but that some members of the crew had not been informed as to their

fire stations and were ignorant of where they were to be stationed in the event of fire.

The failure to conduct proper drills undoubtedly accounted for the confusion and inefficiency of the crew when the fire was reported and contributed to the heavy loss of life. Responsibility for fire drills is placed by statute and regulations directly upon the master and Local Inspectors. Quarterly inspections were made by Local Inspectors and the master made a monthly sworn report to the Inspectors. The master's monthly reports showing the dates of exercise and drill of the crew, the condition of the vessel, and her equipment were filed with the Local Inspectors. The requirement of the regulations which provides that the Local Inspectors shall require the officers and crew of such vessels to "perform the aforesaid drills and discipline in the presence of the Inspectors at intervals sufficiently frequent to assure the said Inspectors by actual observation that the foregoing requirements of this section are complied with" was carried out at intervals during 1934.

Although the entries in the log book which were filed in Torresson's office respecting some 131 drills held in 1932 to 1934 did not strictly conform to the regulations in that they did not state the length of time of the drill, the number of boats swung out, the number of lengths of hose used, and the statement of condition of all fire and life saving apparatus, there was reasonable ground for the managing owners of the libelant to believe that the statute and regulations were being observed in respect to drills. Failure of Captain Willmott to lower the boats into the water during a voyage in May, 1934 when Managing Officer Cabaud was a passenger, did not impute knowledge to him that proper drills were not being held, inasmuch as Captain Willmott, on account of possible damage in lowering boats into the rough sea, said he would defer that part until they reached Havana. The boats were lowered at Havana on May 22, 1934. President Mooney of the libelant company

did not become aware of any improper drills when he was a passenger in April, 1934.

Neither the libelant nor its managing officers knew or had grounds for believing that the fire and boat drills for the crew of the *Morro Castle* had been inadequate and were not being carried out in accordance with the regulations.

14. At the time of the fire two deck hydrants had no hose attached to them and three others not only had no hose connected to them, but were actually capped, two of these on A deck and one on B deck, the latter being the nearest one to the writing room where the fire was first discovered. The B deck hydrant had been capped by order of Captain Willmott after leaving Havana on this voyage because the valve was leaking. That hydrant and another on B deck would have been used at the time of the fire had they not been capped. The hydrants were not capped or the hose disconnected when the ship was in port. The caps were removed from any hydrant which had been capped during the voyage and the hose again attached before arriving in port. The managing officers of the libelant did not know or have reason to believe that any of the hydrants were capped.

15. A muster list was required by law to be prepared by the master of the vessel and approved by the Local Inspectors and this approval was given by the Local Inspectors at Norfolk before the *Morro Castle* sailed on her first voyage. It was checked over and approved by the Local Inspectors in New York in May and August 1934. Fire Station Bills were posted in various parts of the *Morro Castle* but these were lost in the fire. The evidence does not show that the Fire Station Bills and muster roll were incomplete.

16. The fact that Captain Warms and Chief Engineer Abbott had not been informed that only six of the 42 fire

hydrants could be operated at one time with full pressure by the pumps so that if more than six hydrants were used at the same time, the pressure would be proportionately decreased does not condemn the libelant. Captain Willmott and Chief Engineer Abbott had both spent several months in Norfolk while the *Morro Castle* was being built, checking her specifications, watching her construction, and testing her machinery and equipment. The capacity of the fire pumps fully met the required standards.

17. Libelant gave respondent notice of the disaster and libelant alleges that claims for about $13,500,000 were made against it for loss of lives, personal injuries and loss of property as a result of the fire. Libelant made and paid a settlement with all claimants of all liabilities of libelant to claimants arising out of the fire, after notice to the respondent, by the payment of $890,000 and incurred and paid various disbursements and legal expenses in connection with the claims. Proofs of loss and pay orders covering said settlement payment, as well as other payments for which libelant claims reimbursement under respondent's policy, were presented to respondent within six months after payment thereof by the libelant. Respondent repudiated all liability under said policy with respect to the aforesaid matters. This suit was brought within one year of the date of such payments. Said settlement, disbursements and legal expenses were stipulated at the trial to be to some extent proper items of damage against respondent in the event that the libelant was entitled to recover from respondent, and consideration of the amount of any recovery by libelant, if any, was postponed by stipulation until after the trial on the merits.

18. The aforesaid losses, damages and expenses did not arise from the act or neglect of libelant or its managing officers and neither libelant nor its managing officers were

privy to any act or neglect causing said losses, damages and expenses.

CONCLUSIONS OF LAW.

1. The damage sustained by the passengers and their baggage happened through neglect or failure to comply with the provisions of statutes referred to in R. S. 4493 (46 U. S. Code §491), and rules and regulations of the Board of Supervising Inspectors with respect thereto which have the force of law, and under R. S. 4493 libelant became liable to each and every person so injured, to "the full amount of damage".

1-A. The burden rests upon libelant to prove (a) that it became liable to pay the sums which it asserts it has paid, and (b) that it became liable to pay without "actual fault or privity" and without "act of neglect" of any of its managing officers.

1-B. The criminal conviction of the libelant and Cabaud is admissible in evidence not as a bar to the present proceedings, but merely as *prima facie* evidence of the facts upon which the conviction was based.

2. R. S. 4493 is a supplement to R. S. 4283 (46 U. S. Code §183), the Limitation Statute, and adds a further condition to the granting of limitation of liability. The liability imposed by R. S. 4493 is not subject to diminution under R. S. 4283.

3. By virtue of R. S. 4493 libelant became liable, irrespective of any question of privity under R. S. 4283, for the full amount of damage sustained by the passengers and their baggage, undiminished by any limitation of liability under R. S. 4283.

Findings of Fact and Conclusions of Law Under Supreme Court Admiralty Rule 46½.

4. The losses, damages and expenses incurred by libelant did not arise from the act or neglect of libelant or its managing officers, and neither libelant nor its managing officers were privy to any act or neglect causing said losses, damages and expenses.

5. Libelant is entitled to recover from respondent under its protection and indemnity policy of insurance No. C 2336 all such loss and/or damage and/or expenses as libelant became liable to pay and did pay in settling claims by passengers for death, personal injuries and loss of baggage, together with interest.

6. Libelant may recover from respondent under the policy the proportionate share of the limitation fund which it became liable to pay in settling claims by members of the crew for death, personal injuries and loss of effects.

7. Libelant is not entitled to recover from the respondent for the loss which it sustained in settling claims for loss of, or damage to cargo.

8. Libelant is entitled to an interlocutory decree against respondent, with reference to a Commissioner as to damages.

HENRY W. GODDARD
United States District Judge

June 19th, 1940.

APPENDIX B—STATUTES

Statutes

Limitation of Liability

R. S. § 4283—46 U. S. Code 183.

The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forefeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

R. S. § 4493—46 U. S. Code 491.

Whenever damage is sustained by any passenger, or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect, or failure to comply with the provisions of this or the preceding chapter or sections 214 or 215 [*R. S. 4399-4500*], or through known defects, or imperfections of the steaming apparatus or of the hull; and any person sustaining loss, or injury through the carelessness, negligence, or willful misconduct of any master, mate, engineer, or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot, and recover damages for any such injury caused by any such master, mate, engineer, or pilot.

46 U. S. Code 673.

Division of Sailors into Watches

In all merchant vessels of the United States or more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section, the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels, or yachts.

APPENDIX C—TESTIMONY OF U. S. STEAMBOAT INSPECTORS

Excerpts as to inspections and drills by Inspectors

Captain Moffat—Inspection of August 4, 1934

"Q. * * * Did you inspect the boat davits, blocks and falls on the *Morro Castle* on that occasion (August 4, 1934)? A. Yes, sir.

* * * * * * *

Q. What was their condition? A. Good.

* * * * * * *

Q. Did you examine the engines and motor lifeboats? A. Yes.

Q. What was their condition? A. Good.

Q. Did you examine the life preservers? A. Yes.

Q. What was their condition? A. Good (R. 665)

* * * * * * *

Q. Will you please explain to the Court the fire and boat drill. A. Well, you came aboard the vessel and get the officer in charge and let him know you are there and tell him you wish these drills. Then you make arrangements with he——

The Court: What?

Q. (Continued) You make arrangements with the officer in charge about the drills and sound off the alarm and the crew comes to their stations, and at the same time you give a signal to the engineers to start the fire pumps and they give it the usual—several streams of water. Then you take a walk around to the various stations to see that the members of the crew are at the stations and know what they are there for. Then, if we are satisfied with the fire drill——

Q. Do you do anything with the fire hoses? A. Yes; I said we leave the hoses out and have several streams of water to make sure that the pumps are working and getting a good stream.

Q. Did you examine the hoses to see if they were in good condition? A. Yes.

Q. Were they? A. They were, yes, sir.

Q. Go on. A. Through with the fire drill—you are through with the fire drill and go ahead with the boat drill. We pick out the boats and tell the chief officer which boats we want swung, and when the men are mustered and checked they swing the boats out which

we want and lower them into the water. Then we put the crew in, such of the crew as we wish, and exercise them under oars. When we are satisfied, they hoist up the boats and secure them.

Q. Do you know how many boats were put in the water on August 4, 1934? A. There were four" (R. 665-7).

* * * * * * *

Q. Captain Moffat, did you examine the hoses and fire hydrants to see whether the hoses were connected? A. Yes.

Q. Were they? A. Yes, sir.

Q. Were there any disconnected hoses and hydrants that were capped? A. No, sir.

Q. You are positive of that? A. No, sir, not to my knowledge.

Q. Wouldn't you know it? A. If there had been I would know it.

Q. Yes. That is your job? A. Yes, that is our job.

Q. You would have made a report on it? A. Yes.

Q. The fire station bills: Did you examine those? A. Yes.

Q. Did you check them? A. Yes.

Q. And did you check to see if they had a station for every one on board? A. There were stations for all persons, yes" (R. 669).

Captain Sisson—Inspection of February 18, 1934

"Q. How many boats were put in the water? A. All boats were swung out, three lowered to the water, and the crew were exercised in rowing (R. 695).

* * * * * * *

Q. Did you test out the fire pumps? A. Yes, sir.

Q. What did you do? What did that test consist of? A. That test just consisted at this time of putting the pressure on the pump and making sure the release valve let go at the proper pressure, which was 100 pounds at that time.

Q. Was there any water put in the line? A. No, sir.

Q. Why not? A. On account of freezing weather" (R. 696).

* * * * * * *

"Q. How long did the boat drill last? A. The boat drill lasted from 10.35 to 11.

Q. Did you inspect the fire hydrants and the hoses? A. I certainly did.

Q. Tell the Court what you did on that inspection. Where you started, where you finished and who was with you. A. Of course, I went down in the engine room and I covered up what duties I had to do down there, and I started from down below.

Q. Tell the Court what you did. A. If I remember right it was the first assistant that was with me. I came out of the engine room hatch, and we went and covered all the hydrants on that deck and we worked on up, and I think the first assistant engineer left me at the promenade deck because it was real cold that day. Rather than bring him outside with me I continued up to the boat deck.

Q. Did you inspect all the fire hydrants? A. I certainly did, yes, sir.

Q. What did you find with respect to the fire hydrants and the equipment? A. The hose was properly fitted, and they had a spanner in the nozzle.

Q. Does that apply to all? A. That applies to all the hydrants on the ship.

Q. You are sure of that? A. I certainly am, yes.

The Court: If the hose was attached there couldn't have been any cap on the hydrant.

The Witness: When I was aboard there there was no caps on any hydrants, no, sir" (R. 696-7).

Captain McLintock—Inspection of May 14, 1934

"Q. Did you personally inspect all the fire hoses on the *Morro Castle*? A. Yes.

Q. On this inspection in May, 1934? A. Yes.

Q. Did you find any caps on any hydrants on that ship? A. No sir.

Q. Are you sure about that? A. I would have made a report of it if I had.

Q. Were all the hoses connected properly? A. Yes sir.

Q. What was the condition of the hoses and connections? A. In good condition" (R. 751).

* * * * * * *

"Q. What was the condition of the lifeboats and equipment? Were they inspected? A. Yes.

Q. What was their condition? A. They were found to be in good condition" (R. 751-2).

* * * * * * *

"Q. Did you check the fire quarters cards against the largest number of—— A. Admissible crew? Yes.

"Q. What was the number? A. Well, I wouldn't recall except to refer to this. I think 237. I will refer to this record.

Q. Did you get that from the inspection certificate? A. Yes.

Q. Did you check the fire quarters cards to see whether there was a station for every one of the 237? A. Yes.

Q. Was there? A. Yes, there was" (R. 752).

* * * * * * *

"Q. First explain the testing of the boats? A. The testing of the lifeboats and the equipment at each annual inspection consists of quite a number of steps. First of all we examine the boats, falls, blocks, sheaves and pulleys, and then lower the boats to within a foot or so of the water and fill them up with the required complement of crew—not the required complement; the allowed complement, before we lower them into the water, and this is a test to see whether the boat leaks, whether the davits have any flaw in them, and after that is completed we haul the boats back on board, and usually hoist them to the blocks, which gives us an opportunity to get underneath them and we give them a hammer test on the outside, and we then lower them and get inside. It may not follow in this exact order, but these are the steps which are taken. We have all the equipment put out on deck and examine the interiors of the boats; examine all the equipment separately. That is the test of the lifeboats and equipment.

Q. Are they all tested? A. Yes sir.

Q. Were they all tested on this occasion? A. Every one.

Q. Was all the equipment and the falls and the gear found in good condition? A. Yes.

Q. Will you please tell the Court about the fire and boat drills? A. The fire and boat drills consist of exercising the crew at swinging out the boats and lowering a certain number of them to the water and rowing the boats or motoring the motor boats.

Q. How many boats were lowered into the water, if you remember? Does your record show? A. I remember seeing in the record here that we lowered all the port side boats" (R. 753-4).

* * * * * * *

"Q. And how many of the boats were used for exercising the crew? A. All of the port boats.

Q. All? A. All of them. Six of them.

Q. How many men in a boat, about? A. Well, there is 237 crew divided by 12, you get an approximate number, I suppose.

Q. You approximate that? A. Yes.

Q. Was that done in this case? A. Yes.

"Mr. Clark: Your witness.

The Witness: I want to amplify that a bit. I mean to say that would be the approximate number exercised in each life boat out of the total" (R. 754-5).

Moran—Inspection of May 14, 1934

"Q. Did you inspect the fire hose and the hydrants, the fire fighting equipment? A. That is a joint inspection. The two inspectors, or assistant inspectors, perform two duties together. The boiler man takes part as a witness in all fire and boat drills, but he assists and does a share of the work in examining all fire equipment.

Q. What did you find with reference to the hose, how were the tests? A. If there was anything wrong with it it would be noted here.

Q. Did you put water in the hoses? A. Oh yes, they were all tested at 100 pounds, and that is all it says here, fire line and hose tested to 100 pounds, May 15th.

Q. Did you find any caps on any hydrants? A. No.

Q. Did you examine all of the hydrants? A. Went all over those 42 stations to see that they agreed with the number called for on the certificate.

Q. Were the hoses connected on all the hydrants? A. They were all off when we tested them, but after we went through that fire drill and went around those quarters they were all put back in place there. There were no caps in sight. There may have been some hanging there, I have forgotten" (R. 767-8).

* * * * * * *

"Q. What part did you take in the fire and boat drills? A. More as a witness. Generally in going through this thing on an annual the boiler man as a general thing looks after the motor boats to see that the engines operate and are in good working condition by giving them a test to see that they pick up right away.

Q. What did you find with reference to the motors of the motor boats? A. There was nothing the matter with the boats.

Q. Do you remember how many boats were put in the water? A. They were all put in the water at the annual, at the inspection, but after the fire drill business that was held after the inspection was over, that is, getting the crew together and all that sort of thing, which is sort of a finishing touch on this annual inspection, there were not so many boats put in. I think we were confined to one side on account of lighters or something on the other side of the ship.

Q. That was just on one side? A. Yes.

Q. Do you remember which side it was? A. On the port side I think, but I do not make any notations of that; that is all in the other man's books" (R. 768-9).

Martin—Inspection of August 14, 1934

"Q. Did you inspect all the fire hydrants? A. Yes.

Q. Did you find any of them capped? A. No, sir.

Q. You are sure about that? A. Positive.

Q. Did you take any part in inspecting the station bills any further than to look to see if they were in place? A. We only looked around to see if they were posted.

Q. You did not check them, you personally? A. No, sir.

Q. Did you personally participate in the fire and boat drills? A. In the boat drill I was at hand and witnessed the running of the pumps, and I was on my way up above when I heard the ringing of the telegraph, which means stopping the pumps. It does not mean the dismissal of the drill, and there was still men at some of the stations that we first saw on the deck just outside of the engine room, and if I remember correctly one of the hand fire pumps was pretty near adjacent to the engine room there somewheres.

Q. Did you have any part in the boat drills? A. Only the witnessing of the boat drills.

Q. Do you know how many boats were handled on that particular inspection? A. There are six boats on each side, and I know that the motor boat did not go down. It was the rowing boats that went over. Whether there were four or five I could not say" (R. 775-6).

MAY 9 19
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 988

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Petitioner (Libellant-Appellee),

against

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK,
Respondent (Respondent-Appellant).

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case involves mainly questions of fact.

These facts are clearly set forth in the Opinion of the Circuit Court of Appeals.

The petitioner had a choice of taking either one of two principal classes of Protection and Indemnity insurance policies.

(1) It could have taken out an "all-risk" policy, which would cover the actual fault or privity of the assured and the acts or neglect of itself and the managing officers of its organization.

"All-risk" protection and indemnity policies are regularly issued for an appropriate premium.

Sorenson v. *Boston Insurance Co.*, 20 F. (2d) 640;

Eagle, Star & British Dominions Ins. Co. v. *Moore,* 9 F. (2d) 296;
Hanover Fire Ins. Co. v. *Merchants Transp. Co.,* 15 F. (2d) 946.

(2) Instead of taking out an "all-risk" policy, which it now endeavors to persuade this Court it did take out, the petitioner took out a "limited" policy, the material provisions of which are as follows (Italics ours):

> "The Assurers hereby undertake to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expenses as the Assured, *without their actual fault or privity,* shall have become liable to pay and shall pay as shipowners or as having an interest in the vessel named herein on account of the liabilities, risks, events, happenings and/or occurrences herein set forth:
>
> (1) Liability for loss of life of, or personal injury to, or illness of, any person, * * *
>
> (2) Liability for hospital, medical, or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew or any other person. * * *
>
> (8) Liability for loss of, or damage to, or in connection with cargo or other property, including mail and parcel post, including baggage and personal effects of passengers, * * *
>
> (14) Costs, charges, and expenses, reasonably incurred and paid by the assured in defense against any liabilities insured against hereunder in respect of the vessel named herein, * * *
>
> General Conditions and/or Limitations
>
> * * * that in respect of any occurrence likely to give rise to a claim under this policy, the Assured

are obligated to and shall take such steps to protect his (and/or the assurers') interests as would reasonably be taken in the absence of this or similar insurance.

The Assurers shall not be liable to the Assured for any loss, damage, or expense to which the Assured, or the managing officers of his organization are privy, or which arises from his or their act or neglect." (Italics ours.)

Throughout its petition and accompanying brief petitioner refers constantly to the words "actual fault or privity" in the first paragraph of the policy and completely ignores or passes over the following provision in this policy:

> "The Assurers shall not be liable to the Assured for any loss, damage or expense to which the Assured or the managing officers of his organization are privy, or which arises from his or their act or neglect."

Thus there is no important question of insurance law involved. We are not dealing with a "standard form" of policy fixed by law or practice. Individual provisions of Protection and Indemnity policies are regularly changed to meet the varying needs of the owners. Risks to be covered and the premium to be paid are subject to negotiation between the parties.

For an appropriate premium an "all-risk" protection and indemnity policy could have been obtained by the petitioner and can be obtained by any shipowner today who is willing to pay the additional premium to cover the additional risks.

This case concerns only the litigants involved.

The petitioner asks this Court to construe the words in its limited policy, to wit, without "*actual fault or privity*"

and without *"the act or neglect"* of the managing officers of the assured's organization, to mean "something in the nature of fraud on its part, e.g., some willful or deliberate wrong". Petition, p. 20.

No authority is cited for this startling contention and obviously the words "actual fault, privity, act or neglect" mean something less than fraud.

The fact that the policy in this case was for four million six hundred thousand dollars is of no significance, because loss or damage to cargo due to negligence in care, custody or stowage might easily exceed that amount. Furthermore, loss of life in a collision case, both to the persons on board the *Morro Castle* and on another large ocean liner, might easily produce claims running into millions. If, by negligent navigation, the *Morro Castle* had sunk the *Queen Mary* with loss of two to three thousand lives, obviously, a policy for $4,600,000 would be hopelessly inadequate in amount. In both these instances as well as many others the policy would cover.

The concurrent Findings of both Courts establish the following breaches of the Safety Statutes and Regulations of the United States:

1. A continuous failure over four years to divide the sailors into equal watches, in breach of U. S. C. Title 46, §673. For text, see Appendix A.

2. A continuous failure over four years to hold fire and boat drills as required by U. S. C. Title 46, §481, and Supervising Inspectors Ocean and Coastwise Rule 5, subdivision 18. For text, see Appendix A.

3. A continuous failure over four years to make the entries in the log books with respect to Fire and Boat Drills as required by U. S. C. Title 46, §481

and Supervising Inspectors Ocean and Coastwise Rule 5, subdivision 18. For text, see Appendix A.

4. A continuous failure over four years to provide proper watchmen as required by U. S. C. Title 46, §470, and Supervising Inspectors Ocean and Coastwise Rule 5, subdivision 25. For text, see Appendix A.

5. A continuous failure over four years to take any measures whatsoever to see that the Safety Statutes and Regulations were observed.

The concurrent Findings of both Courts were that at 2.10 a.m. on September 8, 1934, a small fire was discovered in the writing room of the *Morro Castle.*

Owing to the fact that the so-called "watchmen" were not on watch, that the sailors who were required by law to be on watch were not on duty, and that no adequate fire or boat drills to train the crew for the emergency of fire had ever been held on the *Morro Castle,* nothing was done to put the small fire out until about 3:00 a. m., when the fire had progressed to a point where it was seen by the First Mate of the *Andrea F. Luckenbach,* which was three to four miles away.

The concurrent Findings of both Courts were that the loss of the vessel, together with the loss of life and cargo thereon, was caused by the breaches of the Safety Statutes and Regulations mentioned above.

Both the District Court and the Circuit Court of Appeals held that the burden of proving that the losses in question were caused without actual fault or privity and without the act or neglect of any of the managing officers of the assured's organization, was on the assured. That ruling was clearly right:

Richelieu & Ontario Navigation Co. v. *Boston Marine Insurance Co.,* 136 U. S. 408;

Carles v. *Travelers Insurance Co.*, 238 A. D. (N. Y.) 43;
Western Assurance Co. v. *J. H. Mohlman Co.*, 83 Fed. 811;
Sohier v. *Norwich Fire Insurance Co.*, 11 Allen (Mass.) 336.

There were three managing officers of petitioner's "*organization*".*

1. Franklin D. Mooney, President of the petitioner.
2. Henry E. Cabaud, Vice President.
3. Thomas S. Torresson, Marine Superintendent.

The Circuit Court of Appeals found all three men guilty of privity and neglect.

Whether they were or were not guilty of privity and neglect was a simple question of fact decided against the petitioner in the Circuit Court of Appeals, which petitioner obviously wishes to reargue in this Court.

Both Mooney and Cabaud are conceded to be managing officers and both were found guilty of privity and neglect.

With respect to Torresson the claim is made that he was not a "*managing officer of assured's organization*" within the meaning of the policy. That Torresson was not an executive officer of the corporation was not disputed, but that he was a managing officer of the assured's "organization" was clearly shown by the nature of his duties.

In its opinion, the Circuit Court of Appeals made the following statement with respect to Torresson:

* The words of the policy are "managing officers" of assured's "*organization*" not company or corporation. See p. 3 hereof.

"Torresson, who had offices on the dock, testified that his duties were to superintend the maintenance of the ship and its equipment, and to see that the laws and regulations with respect to the seaworthiness, fire protection, and safety of passengers and crew were obeyed. Libellant claims that his duties did not bring him within the language in question, which, it asserts, extended only to the executive officers of the company, chosen by the directors to carry out their policies. * * * A marine superintendent who visits the vessel each time it docks, and who is the only shore official having immediate contact with the particular vessel and its officers, would seem to be the direct representative of the owner so far as safety regulations are concerned. At any rate, he is the only one; if not he, then no one has such functions."

That Torresson, as the manager of the marine operations of the petitioner, was a managing officer of its organization within the meaning of the policy was clearly shown by the authorities.

Craig v. *Continental Ins. Co.* (1891), 141 U. S. 638;

Boston Towboat Co. v. *Darrow-Mann Co.*, 276 Fed. 778;

The Erie Lighter 108, 250 Fed. 490;

The Horaisan Maru, 5 F. Supp. 311, reversed on other grounds, 73 F. (2d) 526; cert. den. 295 U. S. 736;

Spencer Kellogg & Sons, Inc. v. *Hicks, Administratrix, et al.*, 285 U. S. 502;

The Calvert, 37 F. (2d) 355, modified on another ground, 51 F. (2d) 494;

In re Jeremiah Smith & Sons, Inc., 193 Fed. 395;

The Galileo, 54 F. (2d) 913, aff'd 287 U. S. 420;

The Princess Sophia, 61 F. (2d) 339.

Even if Torresson's part in this disaster be disregarded altogether, petitioner is still confronted with the fact that the Circuit Court of Appeals found both Cabaud and Mooney, admittedly managing officers of assured's organization, to have been negligent.

Strangely enough, petitioner, overlooking its contention that only some act equivalent to fraud would bar a recovery under the policy in litigation here, concedes at page 23 of its petition that Torresson's negligence would have barred a recovery under the 1935 policy which was taken out after the fire. Petitioner's claim is not that negligence of the managing officers did not bar a recovery under the terms of the policy here in question, but that Torresson was not a managing officer and hence not a person whose negligence barred a recovery.

On petitioner's own statement, therefore, any contention that only fraud bars a recovery under the policy can be eliminated.

In its petition and brief, petitioner states that an examination of the log books by Cabaud and Torresson would not have disclosed that the Safety Statutes and Regulations were being continually breached. Petitioner refers to a finding by Judge Goddard in its favor on this point. The sole basis of Judge Goddard's finding was a statement to this effect by the petitioner in its brief in the District Court. When the log books were produced in the Circuit Court of Appeals, and specific pages pointed out to the Circuit Court of Appeals, they specifically reversed Judge Goddard on this point and found that an examination of the logs, which were equally open to Cabaud and Torresson, clearly disclosed the breaches of the Safety Statutes and Regulations.

As the Circuit Court of Appeals pointed out, the use of fourteen seamen on daytime maintenance work, instead of

dividing the crew into night watches against the emergency of fire, was a matter of economy. The same is true with respect to the so-called "watchmen", who were in reality night stewards serving drinks to passengers or sailors engaged in cleaning and repair work.

The Circuit Court of Appeals obviously did not believe that these matters of economy in hiring men originated with the crew, rather than with the management. As the opinion states, "All these offenses were serious, flagrant, and long-continued. It is almost past belief that they could have escaped the notice of the managing officers of the company; * * *"

In the event that this Court grants this petition, two further questions will have to be considered which were not passed on by the Circuit Court of Appeals:

(1) The effect of the criminal conviction of the petitioner and Cabaud under Title 18 U. S. C., §461, Criminal Code §282, for "knowingly and wilfully" causing the deaths of upwards of 100 persons,* and

(2) Whether the holding of the District Court to the effect that the liability to passengers imposed on a shipowner by R. S. 4493, Title 46 U. S. C., §491, was not subject to limitation under R. S. 4283-4289, Title 46 U. S. C. § §183-189, if there was no privity on the part of the shipowner.

The question of the effect of the criminal conviction of the assured and its managing officer Cabaud was not part of the decision below. It was discussed by Judge Clark in an addendum to the opinion and by Judge A. N. Hand in a concurring opinion.

* For Text of this Statute see petition p. 9.

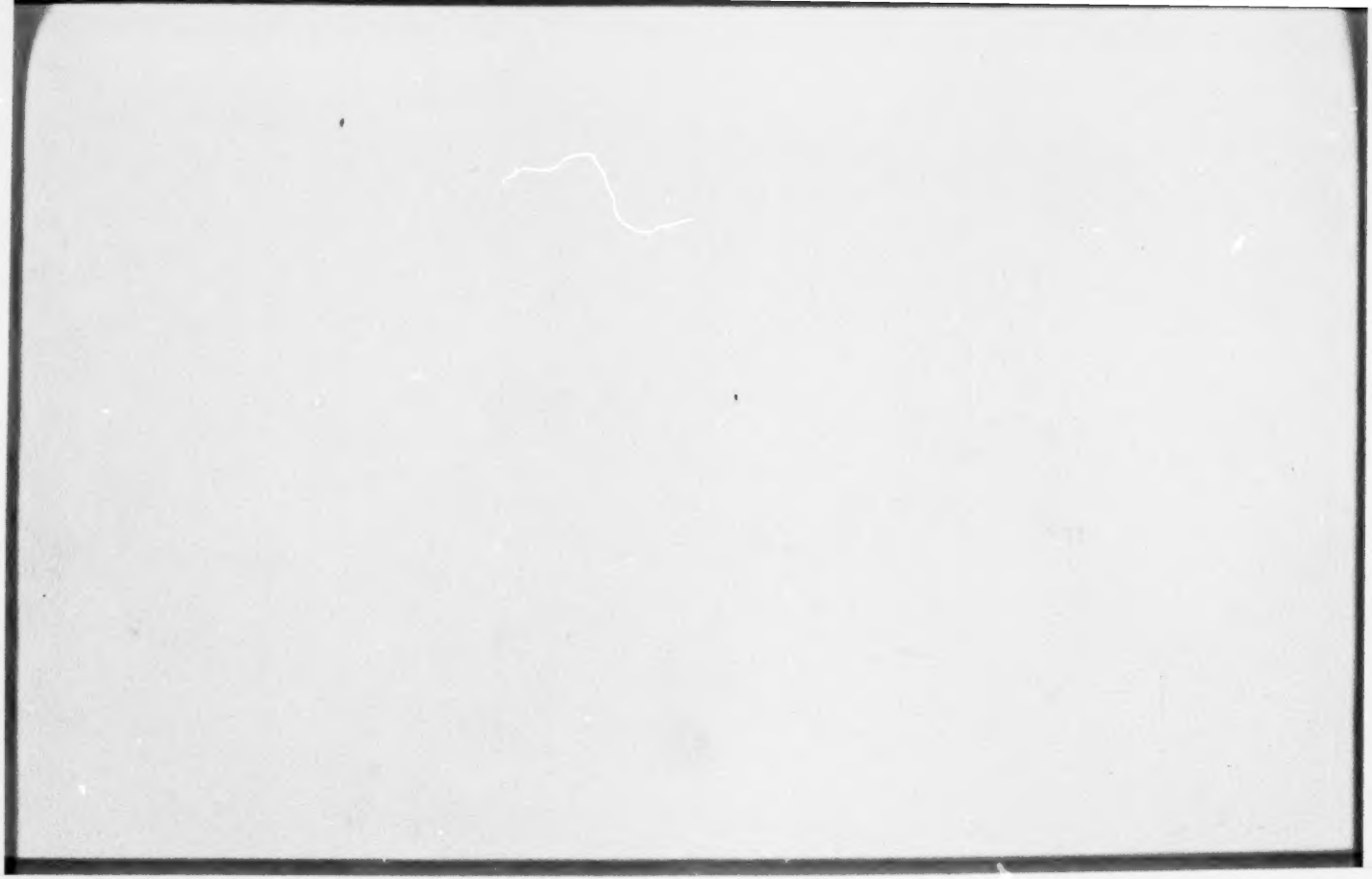
Similarly, the question of whether the Limitation of Liability Statute, now Title 46 U. S. C., § §183-189, which was last passed prior to this disaster on June 26, 1884, U. S. C., §189, was not repealed by R. S. 4493, Title 46 U. S. C., §491 which had been passed on February 28, 1871 was not dealt with by the Circuit Court of Appeals.

Judge Goddard in the District Court fell into the error of deciding that an earlier statute had repealed a later statute by failing to observe the dates on which the two statutes had been passed and by relying merely on the sections of the Revised Statutes, without observing that the Limitation Statute in its present form had been enacted after the statute which it was claimed had repealed it.

The Petition should be denied.

Respectfully submitted,

Cletus Keating,
Arthur M. Boal,
James H. Herbert.



APPENDIX A.

Text of Safety Statutes and Regulations of the United States:

U. S. C., Title 46, Section 673, provides as follows:

> "§673. *Requirements as to watches; duties of seamen; right to discharge.* In all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. * * * (Mar. 4, 1915, c. 153, §2, 38 Stat. 1164.)"

U. S. C., Title 46, Section 481, provides as follows:

> "Musters of the crews at their boat and fire stations followed by boat and fire drills, respectively, shall be held at least once a week, either in port or at sea. An entry shall be made in the official log book of these drills, or of the reason why they could not be held.
>
> "Different groups of boats shall be used in turn at successive boat drills. The drills and inspections shall be so arranged that the crew thoroughly understand and are practiced in the duties they have to perform, and that all the boats and pontoon rafts on the ship with the gear appertaining to them are always ready for immediate use."

Rule V, subdivision 18, of the Board of Supervising Inspectors, reads in part as follows:

> "*Station Bills, Drills and Reports of Masters*
>
> "18. It shall be the duty of the officer in charge of every steamer carrying passengers and all other

steamers of over 500 gross tons and subject to inspection, to cause to be prepared station bills, in which shall be assigned a post or station of duty for every person employed on board such vessel in case of fire or other disaster, which station bills shall be placed in the most conspicuous places on board for the observation of the crew. And it shall be the duty of the master, or of the mate or officer next in command once at least in each week, to call all hands to quarters and exercise them in discipline, and in the unlashing and swinging out of the life-boats, weather permitting, and in the use of the fire pumps, and all other apparatus for the safety of life on board of such vessel, with especial regard for the drill of the crew in the method of adjusting life preservers and educating passengers and others in this procedure, and to see that all the equipments required by law are in complete working order for immediate use; and the fact of the exercise of the crew, as herein contemplated, shall be entered upon the vessel's logbook.

"The rule relating to fire and boat drills contemplates that such drills shall be conducted precisely as though an emergency existed. To accomplish the purpose of the rule, lifeboat covers and strongbacks shall be removed, plugs put in place, painters carried forward and secured so as to provide a good lead and slack to hold the boat in position under the davits when in the water. The hand pumps and fire pump shall be operated long enough and a sufficient number of outlets used to insure that such equipment is in order and effectual.

* * * * * * *

"The entries in the vessel's log book relating to the exercise of the crew in fire and boat drills shall state the day of the month and hour when so exercised, length of time of drill, number of boats swung out, number of lengths of hose used, and a statement of the condition of all fire and lifesaving apparatus."

U. S. C., Title 46, Section 470, provides as follows:

> "470. Watchmen on passenger steamers. Every steamer carrying passengers during the night time shall keep a suitable number of watchmen in the cabins, and on each deck, to guard against fire or other dangers, and to give alarm in case of accident or disaster."

Ocean and Coastwise Rule V, subdivision 25, under the heading "Lookouts and Watchmen", provides as follows:

> "All steamers navigating the ocean during the night time shall have a lookout at all times at or near the bow and one watchman in each cabin and steerage (Sec. 4477, R. S.).
>
> "All watchmen shall be under the direct charge of the master or officer in command of the vessel, and each shall report to the officer in command at the pilot house at fixed intervals of not longer than every hour (Sec. 4477, R. S.).
>
> "All passenger steamers shall, in addition to the regular pilot on watch, have one of the crew also on watch, in or near the pilot house; and this rule applies to all steamers navigating in the night time (Sec. 4477, R. S.)."

FILED
MAY 10 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 988

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Petitioner (Libellant-Appellee)

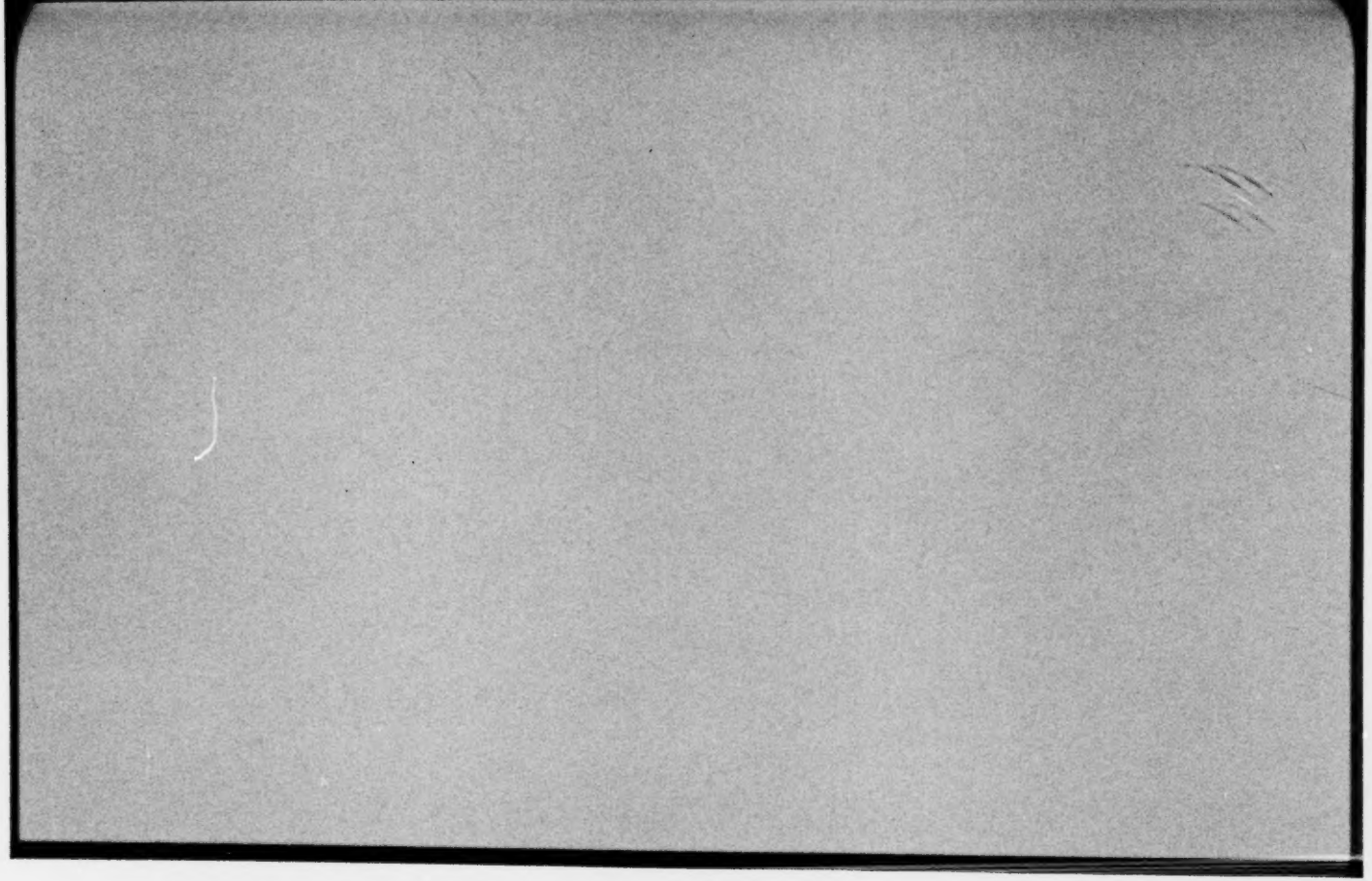
against

THE CONTINENTAL INSURANCE COMPANY
OF THE CITY OF NEW YORK,
Respondent (Respondent-Appellant)

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION

[redacted]

Post Printing Company, Inc., [redacted]



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 988

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY,
Petitioner (Libellant-Appellee)

AGAINST

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK
Respondent (Respondent-Appellant)

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, New York and Cuba Mail Steamship Company, respectfully submits the following comments in reply to respondent's brief.

Respondent errs widely in suggesting that the case involves mainly questions of fact. Reference to the Summary Statement and Questions Presented clearly shows the contrary. Neither do the several references to "concurrent Findings of both Courts" serve any purpose. The facts were fully settled by the District Court in accordance with Admiralty Rule 46½ (see Appendix A to Petition, 54-64). These findings were entitled to respect, but were

substantially disregarded by the Circuit Court of Appeals, notwithstanding that there was no basis in the evidence for disregarding or disturbing them.

There was nothing casual or ill-considered about the taking out of this insurance.

The policy in suit was secured in accordance with and as required by Sec. 11 (g) of the Merchant Marine Act, 1928, "An Act to further develop an American merchant marine, to assure its permanence", etc. (45 Stat. 689). The *Morro Castle* was built under this Act with aid of a construction loan, secured by a preferred mortgage to the Government. Section 3 of the mortgage provided (Ex. 80, R. 898):

"The Shipowner shall, at its own cost and expense, keep the vessel fully insured at all times in an amount at least equal to the full commercial value of the vessel on full form policies. The amount of insurance, the terms of the policies, the risks covered and the insurance companies or underwriting funds shall at all times be satisfactory to the Board. * * *

Among the forms of insurance which the Shipowner shall obtain pursuant to this Section, the Shipowner shall keep the vessel fully entered in a Protection and Indemnity Association or Club approved by the Mortgagee in both protection and indemnity classes, or shall keep the vessel fully covered by protection and indemnity clauses in a policy or policies of insurance satisfactory to the Mortgagee, and such protection and indemnity insurance shall also protect the Mortgagee against any liability which it may incur as Mortgagee or otherwise. * * *

(a) All policies of insurance covering the vessel shall be taken out in the name of the Shipowner for account of whom it may concern, and such policies shall be made payable to the Board for distribution by it to the Board and/or the Owner as their respective interests may appear.

(b) All policies and cover notes shall be delivered to the Board, for its approval and custody. * * *."

The *Morro Castle* P. & I. policy in suit was delivered to and approved by the Department of Commerce as successor to the Shipping Board, and any loss was payable to "the Department of Commerce for distribution by it to mortgagor and mortgagee as their respective interests may appear" (R. 824). Not only was the policy form satisfactory to that Governmental authority which administered the statute for protection of the Government's interest, but the same policy was regularly accepted as due protection by the Government in many other instances, and by great numbers of shipowners. There is no evidence whatever that any other form different in substance was or would be issued by respondent, or by any other underwriter, in respect of a risk situation like that of the *Morro Castle*.

The classification made by respondent as between an "all-risk" and "limited" policy (Brief, 1-3) is fanciful, to say the least. The three cases respondent cites give no support to its contention. The courts which decided them did not intimate a consciousness of any such distinction. On the contrary, they speak of "fraud or willful exposure to known danger," etc., etc. as a defense. See 20 F. (2d) at 643, 644. *Orient Ins. Co.* v. *Adams*, 123, U. S. 67, is there cited, where this Court declined to elevate a remote cause of loss to the status of privity.

In the *Sorenson* case, 20 F. (2d) 640, 641, the policy was a "steamer cargo" policy covering "risk of fire, and/or inland navigation and/or transportation * * * including general average and salvage * * *", also carrier's legal liability. The *Eagle* case policies specified the "protection and indemnity" risks covered. 9 F. (2d) 296, 297. The *Hanover* case policy was also a "protection and indemnity" policy with risks specified, described by the Court as "a

form of policy * * * now in common use". 15 F. (2d) 946, 947.

When this case was in the making in the District Court, respondent contended at page 54 of its brief there that a policy stating in so many words "that it protected libellant against the deliberate acts of the libellant and its Managing Officers in breaching every statute and regulation with respect to safety at sea and constituting criminal neglect" would be void as against public policy—thus then seeking to assimilate the policy at bar to such an imagined type of policy, which clearly it is not.

The question here concerns the policy that was actually used by practical people, not some other form that could have been devised.

Respondent's statement (Brief, 4) that the *Morro Castle* might have done damage exceeding $4,600,000 (assuming a collision with the *Queen Mary*!) misses the point of petitioner's argument. If, as respondent contends, the policy covered only liability that could be limited against under the statute, then the limitation value—value of the vessel after the disaster—would have been the limit of liability under the policy, and there would have been no justification for paying premiums on $4,600,000.

Respondent's statement at Brief 6 is incorrect, that *three* managing officers of petitioner's organization were found "guilty of privity and neglect." As to Mooney, the Circuit Court of Appeals only said: "The president of libellant, a Mr. Mooney saw one drill, but was not called." It made no finding of privity on the part of Mooney. The District Court had expressly found that Mooney had not become aware of any improper drills (Appendix to Petition, 61-2).

There was no evidence whatever that he had ever seen any drill.

As to Cabaud, the District Court found that proper instructions had been given as to division of sailors into watches, fire and boat drills, entries in log books, watchmen and observance of other safety statutes and regulations and that the violations of instructions which occurred on board the vessel were not known to Cabaud. See Findings 11, 12 and 18 in Appendix to Petition. The Circuit Court of Appeals made no finding to the contrary. It rested its decision on its view that Cabaud should not have relied on others, but should have investigated for himself.

Contrary to the findings of the District Court the Circuit Court of Appeals considered Torresson guilty of negligence. But since he was not a managing officer, his negligence did not bar recovery under the *policy* as in effect at the time of the fire, notwithstanding that negligence on his part might have prevented limitation of liability under the *statute,* i.e., had that proposition been in issue.

Respondent's reference at Brief 6 to managing officers of petitioner's "organization," if directed to displacing well understood classifications, would appear to be a boomerang. In the Century Dictionary "organization" is stated to be "often used specifically of an organized body of persons, as a literary society, club, corporation, etc." Petitioner is a corporation, and marine superintendent Torresson was not an officer of said corporation. What gain respondent seeks by the distinction between "corporation" and "organization" is not apparent: in respect of either description the amendment of the policy *after the fire* so as to specify "managing agent" must be deemed to have had

a substantial purpose, i.e., bringing in under the description of "managing *agent*" a person not previously in under the description of "managing *officer*."

Respondent's comment (Brief, 8) on the observations made by the Circuit Court of Appeals to effect that the logs showed violations disregards the fact (as did the Court below) that no statute or regulation required any log entry on the subject of division of watches. The utmost that the Court could properly have said was that the logs did not show *whether or not* the statute was being complied with—in the very nature of things this cannot import notice of a violation. If violations had been disclosed by the logs it is odd that they should not have been picked up by the U. S. Local Inspectors when holding their inspections. Neither the Court below nor the respondent have suggested that the Inspectors did not perform their statutory duties.

The writing of a detailed entry in a log is not proof of what was in fact done, and the converse is true. For illustration we refer to the log entry for the quarterly inspection held on the *Morro Castle* August 4, 1934 (Ex. J-3, R. 1366), which reads:

"10 A. M. Held fire and boat drill under supervision of United States Local Inspectors, Captain Moffat and Mr. Martin."

The two inspectors there mentioned, Captain Moffat and Mr. Martin, testified at the trial, and their testimony shows that very much more was in fact done than the log entry specifies (R. 665-6, 669; R. 775).

In the second paragraph on page 8 of its Brief respondent misdescribes the statement at page 23 of the petition

concerning the 1935 policy amendment whereby a "managing agent" was specifically included as one whose "actual fault or privity" would defeat recovery, etc. Respondent by speaking here of "negligence" (instead of "actual fault or privity") imputes to petitioner an argument it has not made. Without negligence on the part of somebody imputable to the assured no question of liability could ever arise under a liability insurance policy. Such a policy is necessarily in a class by itself and its highly special purpose simply cannot be served if negligence is a defense to the underwriter—or if there is any defense short of something amounting substantially to fraud, willful or deliberate wrong—in the sense shown by the *Sorenson* case *supra* and authorities there discussed.

Respondent does not grapple with the statement of questions presented (Petition, 19) and reasons relied on for granting of the writ (Petition, 20-32), but confines itself to comments which are collateral and irrelevant as against the substantial question squarely presented by the petition —whether a *contract* for protection and indemnity insurance is defeated because of inability of an assured (not guilty of fraud or willful or deliberate wrong causing the loss) to limit liability under the *statute*.* The decision below makes

* The Circuit Court of Appeals assumed that petitioner could not have limited its liability under R. S. 4283 because of privity on the part of marine superintendent Torresson. The District Court had found there was no privity and its decision was on the basis that limitation was prevented by R. S. 4493 because of statutory violations that had taken place on shipboard.

In *Sabine Towing Co.* v. *Continental Ins. Co.* referred to at page 21 of the petition, limitation of liability had been denied by the District Court because of privity of the president of the company. We are informed that the petition in that case is now on file in this Court under Docket No. 987.

the insurance nothing more than a sham and a reproach, and its correction is of transcendent importance.

It is respectfully submitted that the writ should be granted.

ROSCOE H. HUPPER
CHAUNCEY I. CLARK
Counsel for Petitioner

New York City
May 9, 1941.